Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

MALLOTT & PETERSON and
INDUSTRIAL INDEMNITY COMPANY,

Petitioners,

v.

BEATRICE STADTMILLER,

Respondent.

**On Petition For Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is an attorney at law a "representative" as that term is used in 33 U.S.C. § 933(g)?

II. Is a client bound by the acts of her attorney, when the attorney enters into and fully performs a settlement with a third-party without her express authorization?

PARTIES TO THE ACTION

Plaintiff/Respondent:

Beatrice Stadtmiller, widow of Delbert Stadtmiller

Defendants/Petitioners:

Mallott & Peterson, Employer and Industrial Indemnity Company, insurer

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Mallott & Peterson is no longer in existence.

Industrial Indemnity Company is a major insurance underwriter of employer risks in west coast markets. There are no subsidiary companies. Its parent company is Industrial Indemnity Holdings, Inc., whose parent is Talegen Holdings, Inc., whose parent is Xerox Corporation.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals sought to be reviewed was filed October 24, 1996. Appendix A. It affirmed an October 31, 1994 Decision and Order of the Benefits Review Board of the United States Department of Labor. Appendix B. The Board affirmed an October 18, 1993 Decision and Order of Administrative Law Judge Paul A. Mapes. Appendix C.

All three of these decisions hold that an attorney is not a representative and that a client is not bound by the acts of her attorney. All three mention, but do not decide whether a settlement occurred.

STATEMENT OF JURISDICTION

Jurisdiction to grant certiorari is pursuant to 28 U.S.C. § 1254(1). There has been no Petition for Rehearing by the Appeals Court of its October 24, 1996 Opinion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statue involved in this case is 33 U.S.C. § 933, part of the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.* 33 U.S.C. § 933 is reproduced in Appendix D.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This case presents issues of statutory construction, of fundamental principles of agency law, and of what constitutes a settlement pursuant to 33 U.S.C. § 933(g). This case asks if an employer's statutory lien and credit rights may lawfully be frustrated through the sequestration of settlement funds by a claimant's attorney in his trust account.

Delbert Stadtmiller was employed by Mallott & Peterson through 1946. He was exposed to asbestos during that employment, and died of lung cancer December 21, 1990. He was survived by his widow, Beatrice Stadtmiller (hereafter "Stadtmiller".)

Claims were made for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. In addition, a complaint seeking civil damages was filed against the manufacturers and suppliers of asbestos products. Payment of LHWCA benefits was commenced by Petitioners voluntarily. Thereafter, without giving notice to nor seeking approval of Petitioners, Stadtmiller's attorney entered into an agreement with civil defendant, Waldron-Duffy (Waldron); money was exchanged for a dismissal with prejudice, which was duly filed in the Superior Court.

Claimant Stadtmiller was initially represented by the law offices of Kazan, McClain, Edises & Simon of Oakland, California both in her civil and LHWCA claims. She subsequently substituted the law offices of Cartwright,

Slobodin, et al. of San Francisco, California to represent her in her civil claim.

On or prior to August 4, 1992, attorneys in the Cartwright firm negotiated a settlement of Stadtmiller's civil claim against Waldron with Waldron's attorney, Roderic Jones.[1] On September 8, 1992, after transmittal of the agreed upon sum to the civil attorney, Harry Wartnick of the Cartwright firm,[2] Attorney Wartnick executed and filed a Request for Dismissal with Prejudice as agreed to by attorneys Wartnick and Jones. That document was entered by the California Superior Court September 11, 1992.[3] No notice of these transactions was given to Petitioners and no approval was sought or obtained from Petitioners at any time prior to, or even following, the transaction.

Thereafter, Petitioners learned of the civil settlement and filed a motion March 5, 1993, seeking summary decision and relief from further liability pursuant to 33 U.S.C. § 933(g). On March 19, 1993 Attorney Wartnick signed a declaration that he had negotiated the settlement, received the funds, placed them in the firm's client trust account, but that he had not informed his client nor distributed any of the money to her.[4]

Under § 933(g) of the LHWCA, in order to protect the lien and credit rights of maritime employers and their

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[1] Mr. Jones' letter of August 4, 1992, Defendants' Trial Exhibits (hereafter DTE) at pg. 106.

[2] DTE pp. 99, 104.

[3] DTE pg. 1.

[4] DTE pg. 2.

insurers who may be obligated to pay workers' compensation benefits, a claimant forfeits rights to further compensation benefits if she or her representative settles with a third party civil defendant without employer approval.

B. PROCEDURAL HISTORY

The primary issue in all three lower court decisions was whether 33 U.S.C. § 933(g) barred Stadtmiller from receiving further benefits under the Longshore and Harbor Workers' Compensation Act because of third party settlements without employer approval. Administrative Law Judge Mapes did not enforce § 933(g) because he concluded (a) that an attorney was not a representative and (b) a client was not bound by the acts of her attorney. The trial court did not decide if settlement had occurred. The Board and the Ninth Circuit affirmed on these two questions, and also agreed with the trial court that they need not reach the question whether settlement had occurred.

The issues now presented to this Court are whether the Appeals Court erred in (1) construing the term "representative" as used in 33 U.S.C. § 933(g) to exclude attorneys, and (2) concluding that a client is not bound by the acts of her attorneys.

If certiorari is granted and the Appeals Court is reversed, the case should be remanded to the trial level for determination if settlement has indeed occurred.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT A WRIT TO RESOLVE CONFLICTS BETWEEN ITS OWN HOLDINGS AND THE NINTH CIRCUITS' RULING IN THIS CASE.

This Court holds that a client is bound by the acts of his or her attorney. But the Appeals Court holds that respondent is not bound by the acts of his or her attorneys. This Court recognizes that an attorney is the "representative" of a party. But the Appeals Court holds that an attorney is not a "representative." In both of these questions, the courts below have departed so far from the expected and normal course of judicial proceedings as to call for this Court's exercise of its power of supervision.

II. THIS COURT SHOULD GRANT A WRIT TO ADDRESS AN IMPORTANT PUBLIC POLICY ISSUE.

Congress and this Court have repeatedly held, beyond peradventure, that a claimant under the LHWCA has two obligations to the employer with regard to third-party recoveries. (1) Notice must be given of any third-party recovery whether by settlement or by judgment. (2) The employer's approval must be obtained prior to any settlement. Respondent, whether by design or inadvertence, has constructed a scheme to avoid both of these obligations through the expedient of an attorney negotiated settlement with the third-party and sequestration of the recovery in the attorney's trust account. Such conduct obliterates protections afforded to employers under 33 U.S.C. § 933, allows an impermissible shifting of liability

from the third-party to the employer, and ultimately results in a double recovery for the claimant. But rather than condemning such conduct, the courts below have given it judicial *imprimatur*. That result goes far beyond allowing Stadtmiller to escape the statutory sanctions Congress has imposed for such conduct. The decisions below provide a blueprint for avoiding statutory obligations in a multitude of pending and future cases. The actual abuse in this case and the potential abuse in pending and future cases warrants this Court's attention.

ARGUMENT

A.

LEGISLATIVE AND JUDICIAL HISTORY

In 1917 the Supreme Court held that state workers' compensation laws could not constitutionally regulate maritime injuries occurring upon the navigable waters of the United States. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). This left a large group of employees not eligible for traditional seamen's benefits without any workers' compensation remedy. The result was the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, et seq., enacted by Congress in 1927 to fill that void.[5] The LHWCA in its original form was limited to injuries occurring upon navigable waters. § 903 (1927). It provided that liability of the employer under the LHWCA was to be exclusive and in place of all other

[5] Unless otherwise stated, all further reference to code sections are to 33 U.S.C. § 901 et seq.

liability for damages at law or in admiralty. § 905 (1927). The employee had the option of seeking benefits under the LHWCA or pursuing a third party tort feasor, if any such existed. § 933(a) (1927). If a third party recovery was inadequate, the employee could obtain the difference between the third party recovery and the benefits provided under the LHWCA from the employer, after exhausting credit for the third party recovery obtained. § 933(f) (1927). But that deficiency was available only if the employer approved the third party settlement. § 933(g) (1927).

The LHWCA lien and credit rights were challenged almost immediately with the contention they did not extend to insurers. This Court quickly decided,

> That plan would be destroyed if the insurance company were denied the right of subrogation; for the consequences would be to permit the double recovery . . . which the statute is careful to avoid, with resulting increase in the cost of insurance which the statute requires.[6]

Two decades later a severe breach developed in this "plan". A third party ship vicariously liable for negligence of a stevedore employer, which in turn was vicariously liable for negligence of the injured worker's fellow employees, was found entitled to indemnity from the employer, on a warranty theory.[7]

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[6] *Aetna Life Insurance v. Moses*, 287 U.S. 530, 542 (1933).

[7] *Ryan Stevedoring v. Pan-Atlantic Steamship Company*, 350 U.S. 124 (1956).

Following *Ryan*, Congress amended the LHWCA with Pub. Law 86-171 (1959), codified as § 933(i), making the right to compensation or benefits under the LHWCA the "exclusive remedy to an employee when he is injured . . . by the negligence or wrong of any other person or persons in the same employ" except for remedies against third parties. This new provision had the dual purpose of protecting negligent fellow employees directly and protecting employers from vicarious liability, because "rights and liabilities arising within the 'employee family' will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act."[8] This Court explained that the purpose of § 933 was that it "protects the employer."[9]

But employees and third parties continued in their efforts to open the door to the imposition of civil as well as workers' compensation liability on LHWCA employers. Maritime employers were held liable to indemnify third parties even absent negligence, on an unseaworthiness theory.[10] It was time for labor and management to compromise their interests through the legislative process.

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[8] SENATE COMM. ON LABOR AND PUBLIC WELFARE, HARBOR WORKERS-COMPENSATION-THIRD PARTY LIABILITY ACT OF 1959, S. Rep. No. 428, 1959 U.S. Code Cong. & Admin. News 2134, 2135.

[9] *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968).

[10] *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967).

In 1972, Congress made sweeping changes to the LHWCA.[11] Coverage under the LHWCA was expanded to include large new groups of workers ashore, and the benefit structure was dramatically improved. But in exchange, Congress closed and locked the door to employer liability for damages.

In order to achieve uniformity and consistency for maritime employees and employers, these 1972 Amendments thrust coverage under the Act ashore for the first time, covering longshoremen and other harbor workers whether they were injured seaward or landward of the tide line.[12] The benefit structure was substantially increased and a mechanism for annual adjustments was created.[13] In order to further protect, and to reaffirm the earlier employer protections, the exclusivity provisions of § 905 were strengthened.[14] And to still further protect employer lien and credit rights, § 933(g) was amended to clarify the form of the employer approval required for a third party settlement.[15]

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[11] Pub. Law 92-576, the Longshoremen and Harbor Workers' Compensation Act Amendments of 1972.

[12] §§ 902(3) and 903 as amended in 1972.

[13] 33 U.S.C. § 906 as amended in 1972.

[14] Newly enacted § 905(b), eliminated the unseaworthiness cause of action, eliminated actions by longshoremen, ship builders, or ship repairmen against vessels based on negligence of fellow employees, and provided that any "agreements or warranties to the contrary shall be void."

[15] Prior to 1972, § 933(g) only required written approval by the employer, and did not specify the form. After 1972, such approval had to be obtained "prior to such compromise on a form provided by the Secretary and filed in the office of the

Just as Congress in 1959 eliminated an employee's right to seek damages for the negligence of fellow employees, in 1972 it eliminated an employee's right to damages for unseaworthiness that fellow employees failed to prevent. Consistent with this policy, maritime employers could not be held liable either directly or indirectly for damages to injured employees.

Consistent with this strong legislative history, this Court continued to protect employer lien and credit rights through individual decisions holding that a third party may not offset its liability for damages caused by alleged comparative employer fault.[16] This Court went so far as to hold that an employers lien and credit rights were "inviolable".[17] Thus not only were maritime employers immunized from liability beyond that provided under the LHWCA, but their credit rights were also protected at every turn.

In 1984 Congress again amended the LHWCA, once more strengthening employer lien and credit rights.[18] In order to avoid double recovery, express provision for

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deputy commissioner . . . within thirty days after such compromise is made." 33 U.S.C. § 933(g) (1972).

[16] *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

[17] *Bloomer v. Liberty Mutual*, 445 U.S. 74 (1980). *Bloomer* rejected an attempt to hold the employer liable for part of the employee's attorney fees in securing third party recovery. The Court reasoned that would indirectly impose upon the employer liability for civil damages, which the LHWCA prohibits.

[18] Pub. Law 98-426, the Longshore and Harbor Workers' Compensation Act Amendments of 1984.

credit as to benefits paid under other compensation laws was added.[19] And to correct mischievous administrative construction of the LHWCA, Congress added § 933(g)(2) in 1984. The additional language of § 933(g)(2) provided that forfeiture of rights to workers' compensation benefits otherwise due for failure to obtain employer approval for a settlement applies "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act."[20] Both Congress in 1984, and the Supreme Court in 1992[21] made it clear that maritime employer lien and credit rights were independent of any actual payment under the LHWCA.

In promulgating the 1984 Amendments, Congress stressed how important it considered the lien and credit rights of maritime employers. "The compensation lien on the net [third party] recovery remains inviolable, consistent with *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980)".[22]

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[19] § 903(e) as enacted 1984.

[20] This language was added to clarify a misinterpretation by the Department of Labor, which had held that forfeiture applied only if payments were actually being made. *O'Leary v. Southeast Stevedore*, 7 Ben.Rev.Baud.Serv.(MB) (1977). *O'Leary* has been overruled. *Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469 (1992).

[21] *Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469 (1992).

[22] JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, 130 Cong. Rec. H9597, 9601.

Despite the clear, unambiguous language of § 933(g)(2) added in 1984, the Benefits Review Board continued with its own prior construction, which had restricted employer lien and credit rights. The Board's construction of the phrase "person entitled to compensation" was different in § 933(g) than elsewhere in the LHWCA. In § 933(g) it based its definition on whether the person was receiving rather than whether the person was entitled to receive compensation.[23] Those two errors by the Board were corrected by this Court in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992).

This presents yet another attempt by LHWCA claimants to design a mechanism to avoid employer lien and credit rights in order to make a double recovery. Distinguishing insurers from employers failed in *Moses*. Shifting attorney fees to the employer failed in *Bloomer*. Allocating credit rights based on self serving attorney assessments failed in *Force*.[24] Characterizing relationships based on allegations rather than on facts failed in *Cowart*. Within months of this Court's *Cowart* decision, Stadtmiller's attorneys embarked upon the scheme presented in the instant case – to utilize the firm trust account and the wall built by the attorney-client privilege and simply proclaim that there has been no settlement. Once again the Board and now the Ninth Circuit have applied § 933 in a manner that frustrates Congress' purpose, by holding that a client is not bound by the acts of her attorney and that an attorney is not a representative.

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[23] *Dorsey v. Cooper Stevedoring*, 18 Ben.Rev.Baud.Serv. 25 (1986).

[24] *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991).

Again this Court is asked to correct these errors and restore employer rights that Congress intended.

B.

ATTORNEY HARRY WARTNICK IS BEATRICE STADTMILLER'S "REPRESENTATIVE" AS THAT TERM IS USED IN 33 U.S.C. § 933(g)

Section 933(g) of the LHWCA provides that if either "the person entitled to compensation (*or the person's representative*) enters into a settlement" without employer approval, the employer owes no further compensation. The Appeals Court held that "representative" means "legal representative", and is limited to administrators or executors of an estate. The rationale is that § 933(c) contains language regarding "the legal representative of the deceased (hereafter referred to as 'representative')".

There are two ways to construe the parenthetical phrase in § 933(c). The Appeals Court construes the phrase to mean that hereafter the term representative *only means* legal representative. Appellants construe the phrase to mean that hereafter the term representative *also means* legal representative. The question before this Court can be reduced to which of these two constructions is the correct one.

If statutory language is clear, no process of construction is necessary.[25] In construing plain language, it is presumed that every word in a statute has an effective

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[25] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

and operative result.[26] As the Court held in *Cowart*, a term must have the same meaning throughout a statute.[27]

The term "representative" appears several places in the LHWCA. It is found in §§ 928(e), 931(a)(1), 931(b)(1), 933(c), 933(g), 933(i), 941(c) and 941(d).

Section 928(e) prohibits a *representative* from collecting a fee without an appropriate administrative or judicial order. Only attorneys at law are allowed fees for representation under the LHWCA. Therefore under that code section the term representative cannot refer to an executor or administrator. It can only refer to an attorney-at-law.

Under §§ 931(a) and (b), sanctions are imposed if "any claimant or *representative* of a claimant" knowingly makes a false statement in order to obtain benefits. An executor or administrator of an estate is not a representative of a claimant. An executor or administrator of an estate *becomes* the claimant. An attorney at law may be a representative of a claimant, whether the claimant be the employee, a dependent, or an executor. It makes no sense to construe the term representative to mean executor or administrator in that context because an executor is in the class of potential claimants. Furthermore, the purpose of § 931 would be frustrated if attorneys were not subject to sanctions for misrepresentations. Section 931 is the

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[26] *United States v. Menasche*, 348 U.S. 528, 538-39 (1942).

[27] 505 U.S. 469. In *Cowart*, the term "person entitled to compensation" appeared in several places in the LHWCA. The Board had construed that term differently in § 933(g) than elsewhere.

LHWCA equivalent of Fed.R.Civ.P. 11. There is no reason to suspect that Congress intended to hold both clients and their attorneys responsible in Rule 11, but only the client responsible in § 931.

The term "legal representative" in § 933(c) should be construed to mean an executor or administrator of an estate. Section 933(c) deals with death claims where there are no dependents, and assigns standing to pursue third party claims.

Turning to § 933(g)(1), the LHWCA refers to a person entitled to compensation "or the person's representative". A deceased person is not entitled to compensation. Rather, compensation in that case would be payable to an estate, to a dependent, or to an heir. But not to the deceased person. Therefore it is not reasonable to conclude that Congress intended to limit the meaning of the term representative in subsection (g)(1) to "legal representatives" in the sense of executors or administrators of estates.

There is another problem with limiting the definition of representative in § 933(g) to legal representatives of estates. Minors and incompetents, though alive, cannot legally settle except through a representative, such as a guardian or an attorney. If § 933(g) requires the action of either a person entitled to compensation or the executor or administrator of a deceased person's estate, then minors and incompetents could never settle with a third party and obtained employer approval, because no person would exist who meets the Appeals Court's limited definition of representative. It is not reasonable to conclude that Congress intended this result especially if it

results in absolutely no protection of the employer's lien and credit rights.

The term *legal representatives* is used also in § 933(i). If Congress intended that the parenthetical phrase in § 933(c) meant that representative *only* meant legal representative, the word "legal" in § 933(i) would be superfluous. This would violate the rule in *Menasche*[28] that every word must have an operative effect.

If there is or may be ambiguity, the reason for the statute should be used as a guide in construing the term.[29] This Court has determined that the purpose of § 933(g) employer approval is to protect the employer.[30] The employer's interest is not protected if an attorney can settle a claim without causing the same sanctions that would result if the client did so.

Attorney Wartnick settled Stadtmiller's claim against Waldron. Petitioners were prejudiced in two ways by the failure to seek their approval. First, no credit could be taken against ongoing compensation payments, because Petitioners did not know of the existence or the amount of settlement funds received. Second, Petitioners were denied the opportunity to evaluate the adequacy of the offer, which was less than half of what the third party itself was willing to pay.[31]

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[28] 348 U.S. 528, 538-39.

[29] *S&E Contractors v. United States*, 406 U.S. 1 (1972).

[30] *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968).

[31] See August 4, 1993 letter from Roderic Jones, which documents settlement authority up to $10,000. DTE p. 106.

A court should consider how a term is used in other statutes.[32] The Ninth Circuit has construed the term "legal representative" as including a party's attorney at law in construing 28 U.S.C. § 2675(e).[33] Fed.R.Civ.Pro. 26(b)(3) also uses the term representative to mean attorney and is totally inconsistent with the construction given that term by the Appeals Court. Rule 1 of the Judicial Council Rules for the Ninth Circuit, dealing with ethical conduct of judges, also uses the term representative in the context of an attorney, in a manner inconsistent with its meaning as an executor of an estate as construed by the Board.

But perhaps most important, a construction that produces an anomalous result is for that very reason a doubtful reading of a statute.[34] Unreasonableness of a construction is grounds for rejecting it in favor of another.[35]

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[32] *Erlenbaugh v. United States*, 409 U.S. 239 (1972).

[33] *Graves v. United States Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982). The Federal Tort Claims Act requires that a complaint be signed by the plaintiff, his agent, or his legal representative. Regulations require evidence of authority if the claim is signed by an "agent, executor, administrator, parent, guardian, or other representative." 28 U.S.C. § 2675(e). Graves' complaint was signed by his attorney at law, without evidence of authority. The 9th Circuit ruled that the attorney could file without evidence of authority because he was a "legal representative", and thus not specifically listed among those required to present such evidence.

[34] *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 177-78 (1989).

[35] *Sierra Club v. State of Alabama*, 557 F.2d 485 (5th Cir. 1977).

In a long line of cases, some maritime, this Court has held that a statute *"must be read in the light of the mischief to be corrected and the end to be attained."*[36] The "mischief to be corrected" by § 933(g) is conduct that undermines employer lien and credit rights. The "end to be attained" by § 933 is to "protect the employer['s] "rights".[37]

The construction below is wrong because it compounds the mischief rather than corrects it. If attorneys can settle away an employer's rights with impunity, as would be the case if the construction below is allowed to stand, the employer's rights would become a nullity. Attorneys could simply settle as did the attorneys here, deprive employers of both credit and lien rights, and obtain double recovery for their clients. But most significantly, the construction below is wrong because it frustrates the purpose rather than furthering its end.

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[36] *Warner v. Gultra*, 293 U.S. 155, 158 (1934), (emphasis supplied) construing "seaman" in the Merchant Marine Act; quoted with approval in *South Chicago Coal & Dock Co. v. Bassett (Schumann)*, 309 U.S. 251, 259 (1940), construing "crew member" in the LHWCA; *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944), construing "employee" in the NLRA; and *McDermott International v. Wilander*, 498 U.S. 337, 349 (1991), referring to this "salutary principal" when construing "seaman" in the Jones Act.

[37] *Banks v. Chicago Grain Trimmers*, 390 U.S. 459 (1968).

C.

BEATRICE STADTMILLER AS CLIENT IS BOUND BY THE ACTS OF HER ATTORNEY, WHEN SUCH ACTS ARE PERFORMED IN THE COURSE OF HIS REPRESENTATION

Even if "representative" in § 933(g) does not include a party's attorney, the result here should be the same. A fundamental rule of agency law is that a principal or client is bound by the acts of her agent or attorney.

The Appeals Court applied its understanding of California law. In doing so it erred in two respects. (1) Federal rather than state law must be applied to the agency issue. (2) Even so, it applied California law incorrectly.

The facts in this case present a question of the construction of a federal statute before a federal tribunal. Authority requires federal rather than state law applies. "Indeed, we have stated that 'it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law' ".[38]

Federal law, which Congress has assumed applies in this matter, states that a client is bound by the acts of his or her attorney.[39] More recently, this Court quoted *Link* with approval, applying it to a "representative", and explained that the practical result of a contrary rule would be confusion and uncertainty.[40]

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[38] *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638, 646 (1990), quoting *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 603 (1971).

[39] *Link v. Wabash Railroad*, 370 U.S. 626, 633 (1962).

[40] *Irwin v. Veterans Affairs, et al.*, 498 U.S. 89, 92-93 (1990).

Here, worse than confusion and uncertainty, the contrary rule applied by the Appeals Court results in frustration of Congressional purpose and a blueprint for abuse.

California holds in *Gagnon* that a client is bound by the actions of his or her attorney.[41] But the Appeals Court improperly relies on *Blanton*, which affords a limited exception not applicable in this case.[42] *Blanton* affirmed the earlier California decision in *Gagnon*, but distinguished it on the basis that the conclusive presumption of an attorney's authority only applied to parties other than the attorney and the client. It did not preclude the client from challenging her own attorney's authority.

But Stadtmiller is not attacking her attorneys' authority to act. She never instructed that they lack settlement authority, never instructed them to undo what they had done, and never, according to her deposition testimony, talked with them on the issue. Stadtmiller testified May 25, 1993 that she had never instructed her representative either to settle or not to settle her claim or any portion of it.[43]

Blanton expressly refused the authority requested by her attorney. Stadtmiller never expressed instructions. In *Blanton* all parties, including the judge and defense counsel were aware prior to the action that the attorney lacked authority. Here neither defense counsel nor the civil court that entered the dismissal nor Petitioners had any reason

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[41] *Gagnon Co., Inc. v. Nevada Desert Inn*, 45 Cal.2d 448, 460, 289 P.2d 466 (1955).

[42] *Blanton v. WomanCare*, 38 Cal.3d 396 (1985).

[43] DTE pg. 28.

to believe that Harry Wartnick lacked authority to settle. Blanton took immediate action to remedy her attorney's unauthorized acts. Stadtmiller did absolutely nothing to remedy the alleged unauthorized acts of her attorney. *Blanton* acknowledged that ratification overcomes lack of authority, but found that there was no ratification because the client took immediate steps to remedy the attorney misconduct. Here, neither claimant nor her attorney in the LHWCA case took any action to remedy the allegedly unauthorized settlement for 290 days, and then only as an attempt to avoid the forfeiture provision of § 933(g).

While California recognizes a client's right to challenge unauthorized conduct by her counsel, it at the same time holds the client responsible for the consequences of her attorney's conduct. It is necessary to hold the client responsible for the conduct of her attorney to carry out the purpose of the relevant statute.[44] That very same necessity exists here.

CONCLUSION

The purpose of § 933(g) of the LHWCA is to protect employer lien and credit rights by imposing upon claimants duties (a) to give notice of and (b) to obtain approval for third party settlements. The consequence to claimants for violating those duties is forfeiture of further compensation. Stadtmiller, through her attorneys, has engaged in conduct crafted to frustrate the purpose of the statute,

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[44] *In Re Marriage of Daniels*, 19 Cal.App.4th 1108 (1993).

deny appellants their lien and credit rights, and achieve a double recovery.

The holdings by the Ninth Circuit are prescriptions for abuse and for frustration of Congressional purpose. If those holdings are allowed to stand, the maritime employer lien and credit rights protected so consistently and tenaciously by Congress and this Court for the last sixty years will become a nullity. Claimants will be free to settle away their employers' rights with impunity, through undisclosed oral agreements and by playing a shell game with settlement proceeds.

This Court should grant a writ for the forgoing reasons.

Dated: January 22, 1997

Respectfully Submitted:

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALLOTT & PETERSON AND INDUSTRIAL INDEMNITY CO., *Petitioners,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR; BEATRICE STADTMILLER, widow of Delbert Stadtmiller, *Respondents.*	No. 94-70927 OWCP No. 13-87454 BRB No. 94-0439 OPINION

Petition for Review of an Order of the Benefits Review Board

Argued and Submitted
April 12, 1996 – San Francisco, California

Filed October 24, 1996

Before: Joseph T. Sneed, William A. Norris, and Charles Wiggins, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Admirality and Marine/Workers Compensation

The court of appeals denied a petition for review of an order of the Benefits Review Board of the Department of Labor. The court held that "representative" does not

include legal counsel acting within an attorney-client relationship for purposes of settling third party claims under the Longshore and Harbor Workers' Compensatior Act (LHWCA).

A claimant under the LHWCA may pursue claims against a third party without forgoing compensation under the LHWCA. The LHWCA protects employers against claimants entering into inordinately low settlements that would deprive the employer of a proper setoff by providing that "a person entitled to compensation (*or the person's representative*)" who enters into a settlement with a third party without the approval of the employer forfeits LHWCA compensation.

Petition Mallott & Peterson (M&P) and its LHWCA insurer, petition Industrial Indemnity Company, (collectively, M&P) owed benefits to respondent Beatrice Stadtmiller under the LHWCA. Stadtmiller was represented by her attorney Harry Wartnick. Certain actions of Wartnick allegedly settled Stadtmiller's claim against third party Waldron Duffy, Inc. without the approval of M&P.

The Board interpreted "representative" to exclude legal counsel acting within the attorney-client relationship and held that M&P was liable to Stadtmiller. The Board also held that the finding of an administrative law judge (ALJ) that Stadtmiller had not ratified any settlement was reasonable in light of the evidence presented.

In its petition for review, M&P contended that the Board misconstrued the term "representative." M&P argued that the term must include legal counsel acting within the scope of the attorney-client relationship.

Stadtmiller and respondent Director of the Office of Workers' Compensation Programs contended that "representative" means the legal representative of a deceased person, such as an executor or administrator, and not legal counsel such as Wartnick. M&P also contended that Stadtmiller ratified the settlement negotiated by Wartnick.

[1] If the provision of the LHWCA to be interpreted is easily susceptible to the Director's interpretation, the reviewing court need go no further. [2] The Director's interpretation of "representative" to mean the legal representative of the deceased, and to exclude legal counsel acting within the attorney-client relationship, is reasonable. [3] The Director's interpretation does not frustrate the purpose of protecting employers from inordinately low settlements because an attorney cannot settle a case without some action by the client, i.e., the claimant or his or her legal representative.

[4] Ratification is a question of fact and M&P bore the burden of proving that Stadtmiller ratified Wartnick's efforts. [5] The ALJ's finding of no ratification was supported by substantial evidence. Even if Stadtmiller had known the details of Wartnick's conduct, it was doubtful that she would have realized the conduct amounted to a settlement or understood enough about the legal consequences of a settlement to have knowingly ratified it.

COUNSEL

Roger A. Levy, Laughlin, Falbo, Levy & Moresi, San Francisco, California, for the petitioners.

Victoria Edises and Anne Landwehr, Kazan, McClain, Edises, Simon & Abrams, Oakland, California; Mark A. Reinhalter, Office of the Solicitor, Department of Labor, Washington, D.C., for the respondents.

OPINION

NORRIS, Circuit Judge:

Section 933 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988) (LHWCA or Act), establishes a claimant's right to pursue claims for his or her injuries against third parties without forgoing compensation under the Act. Subsection (g), the provision at issue in this case, protects employers against claimants entering into inordinately low settlements that would deprive the employer of a proper setoff available under subsection (f).

Subsection (g) provides that "[i]f the person entitled to compensation (*or the person's representative*)" under the Act enters into a settlement of a claim against a third party without approval of the employer, the person forfeits his or her rights to the LHWCA compensation. 33 U.S.C. § 933(g) (emphasis added). The Benefits Review Board of the Department of Labor (Board) interpreted "representative" as used in § 933(g) to exclude legal counsel acting within the attorney-client relationship. It therefore held that Mallott & Peterson and its LHWCA insurer, Industrial Indemnity (Employer), which owed LHWCA benefits to Beatrice Stadtmiller, were liable to Stadtmiller despite certain actions by her attorney Harry Wartnick which allegedly settled Stadtmiller's claim

against third party Waldron Duffy, Inc. (Waldron) without Employer's approval.[1] *Stadtmiller v. Mallott & Peterson*, 28 Ben. Rev. Bd. Serv. (MB) 304, 1994 WL 661134, at *5 (1994) (per curiam). The Board also held that the finding of the Administrative Law Judge (ALJ) that Stadtmiller had not ratified any settlement was reasonable in light of the evidence presented. *Id.* at *7. Employer timely petitioned pursuant to 33 U.S.C. § 921(c) to have the Board's decision set aside. We deny the petition.

I

Employer argues that the Board misconstrued the term "representative" as used in § 933(g). According to Employer, the way the term "representative" is used in other provisions of the LHWCA, as well as in other statutes, and the general purpose of the LHWCA, establish that "representative" as used in § 933(g) must include legal counsel acting within the attorney-client relationship. Stadtmiller and Respondent Director of the Office of

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[1] Employer argues on appeal that the Board erred when it refused to take judicial notice of a "Notice of Class Action" filed in another case, which allegedly establishes that Stadtmiller had entered into an unapproved settlement of a claim against third party Fiberboard. The Board did not err.

The Board's review is not de novo, and the Notice was not part of the record before the ALJ. Moreover, although the Notice states that Wartnick had settled his existing claims against Fiberboard (and thus was eligible to represent the Class in the other suit), it was not beyond reasonable dispute that Stadtmiller's claim, which is not specifically mentioned in the Notice, was among the ones settled. Thus, the "fact" allegedly established by the Notice is not among the traditional matters of judicial notice. *See* 29 C.F.R. § 18.45; Fed. R. Evid. 201.

Workers' Compensation Programs assert that "representative" in § 933(g) means the legal representative of a deceased person, i.e., an executor or administrator, and thus does not include legal counsel such as Wartnick.

[1] Although decisions of the Board are reviewed for "errors of law," *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 889 (9th Cir. 1993), "considerable weight" is accorded to the statutory construction of the LHWCA urged by the Director. *Hunt v. Director, OWCP*, 999 F.2d 419, 421 (9th Cir. 1993); *see also Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992) (explaining that Secretary of Labor delegated to OWCP " 'all functions of the Department of Labor with respect to the administration of benefit programs' under the [LHWCA] and designated the Director to represent him in all review proceedings. Thus the Director, as the policy-making authority, is to be accorded deference.") (citations omitted). If the Director's interpretation is "reasonable," the court should defer to it. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 158 (1991). Put another way, if the provision to be interpreted is "easily susceptible" to the Director's interpretation, the reviewing court "need go no further." *Hunt*, 999 F.2d at 421.

This deference extends not only to regulations articulating the Director's interpretation, but also to litigating positions asserted by the Director in the course of administrative adjudications, since administrative adjudications are agency action, not post hoc rationalizations for it. *Martin*, 499 U.S. at 156-57.

[2] For the reasons stated by the Board in its decision, *see* Stadtmiller, 1994 WL 661134, at *4-*6, we hold that

the Director's interpretation of "representative" in § 933(g) to mean the "legal representative of the deceased," and to exclude legal counsel acting within the attorney-client relationship, is reasonable. Section 933(c) specifically defines the term "representative" for purposes of § 933. Section 933(c) provides that "legal representative of the deceased" is "hereinafter referred to as 'representative.' " 33 U.S.C. § 933(c); *see also Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 539 (1932) (interpreting "representative" in § 933(e) to mean "representative of the deceased"). Moreover, only the Director's interpretation of "representative" can be reconciled with the specific language of § 933(g)(1). Section 933(g)(1) refers to entering into settlements "for an amount less than the compensation to which the person (or the person's representative) would be entitled. . . . " As the Board pointed out, "[w]hile a legal representative of the decedent may receive compensation [for a LHWCA claim], his attorney cannot." *Stadtmiller*, 1994 WL 661134, at *5. Attorneys can recover attorney's fees, but they are not entitled to recover "compensation," defined in § 902(12) of the Act as "the money allowance payable to an employee or his dependents. . . . " 33 U.S.C. § 902(12).

[3] We reject Employer's arguments against the Director's interpretation for the reasons stated by the Board. *See Stadtmiller*, 1994 WL 661134, at *5-*6. In addition, contrary to Employer's assertion, the Director's interpretation does not frustrate § 933(g)'s purpose of protecting employers from inordinately low settlements because an attorney cannot settle a case without some action by the client, i.e., the claimant or his or her legal representative. *See Levy v. Superior Court*, 896 P.2d 171, 175-76 (Cal. 1995) (holding that the signature of a party's

attorney is insufficient to create an enforceable settlement under California law); *Blanton v. Womancare, Inc.*, 696 P.2d 645, 650, 653 (Cal. 1985) (invalidating agreement to submit dispute to binding arbitration without possibility of judicial review because it was entered into without client's consent and it impaired client's substantial rights); *Whittier Union High Sch. Dist. v. Superior Court*, 136 Cal. Rptr. 86, 89 (Cal. Ct. App. 1977) ("the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation"); *accord United States v. Beebe*, 180 U.S. 343, 352 (1901).

II

[4] Employer argues in the alternative that, even if Wartnick is not a "representative" within the meaning of § 933(g), Stadtmiller nonetheless forfeited her benefits because she ratified the settlement negotiated by Wartnick.[2] Ratification is a question of fact. *Common*

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[2] The ALJ held that under applicable California law, an attorney's actions will bind his or her client on agency principles (1) when the attorney has actual authority from the client to enter into the settlement; (2) when the attorney has apparent authority; or (3) when the unauthorized settlement is later ratified by the client. Order denying motion for rescission, dated Oct. 18, 1993, at 9 (citing *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985)). The ALJ found that Wartnick had neither actual nor apparent authority. Employer did not challenge those findings before the Board and does not challenge them here. Instead, Employer contends that Federal law applies, and that

Wealth Ins. Sys., Inc. v. Kersten, 115 Cal. Rptr. 653, 661 (Cal. Ct. App. 1974). Employer bears the burden of proving that Beatrice ratified Wartnick's efforts. *See Gates v. Bank of America Nat'l Trust & Sav. Ass'n*, 261 P.2d 545, 547-48 (Cal. Ct. App. 1953).

Decisions of the Board are reviewed for "adherence to the substantial evidence standard." *Metropolitan Stevedore*, 11 F.3d at 889. The Board's own review of the ALJ's factual findings is similarly limited by the LHWCA. 33 U.S.C. § 921(b)(3) (ALJ's factual findings "shall be conclusive if supported by substantial evidence in the record considered as a whole"). "The Board may not substitute its views for those of the ALJ, but instead must accept the ALJ's findings unless they are contrary to the law, irrational, or unsupported by substantial evidence in the record." *King v. Director, OWCP*, 904 F.2d 17, 18 (9th Cir. 1990) (per curiam) (internal quotation omitted).

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under Federal law, a client is bound by the acts of her attorney. The instances in which the courts are authorized to fashion federal common law are restricted to "those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted). Neither category is relevant here. *See Slavin v. Commissioner*, 932 F.2d 598, 601 (7th Cir. 1991) ("Normally the authority of an agent (a lawyer is just a specialized agent) derives from state law; that the substantive dispute concerns federal law does not matter."). Moreover, under federal law, "[w]hile there is a presumption that a settlement entered into by an attorney has been authorized by the attorney's client, rebuttal of the presumption renders any purported settlement ineffective." *Michaud v. Michaud*, 932 F.2d 77, 80 (1st Cir. 1991).

[5] The Board determined that the ALJ's finding that Stadtmiller had not ratified Wartnick's efforts was rational, given the evidence in the record. Ratification requires that the principal, knowing the facts, accepts the benefits of the agent's actions. *See Alvarado Community Hosp. v. Superior Court*, 219 Cal. Rptr. 52, 54-55 (1985). We agree with the Board that the ALJ's finding of no ratification was supported by substantial evidence in the form of testimony by Wartnick and Waldron's attorney that Stadtmiller refused to sign a release in favor of Waldron. Neither Stadtmiller's deposition nor her written declaration required the ALJ to infer that she was aware that Wartnick had dismissed her action against Waldron or that he had received a payment earmarked for her as a result of the dismissal. We join the Board in accepting the ALJ's reasoning that, even if Stadtmiller had known the details of Wartnick's conduct, it is doubtful that she would have realized this conduct amounted to a settlement or have understood enough about the legal consequences of a settlement to have knowingly ratified it. In sum, the Board properly applied the substantial evidence standard when it affirmed the ALJ's finding that Stadtmiller rejected rather than ratified any settlement agreement.[3]

CONCLUSION

We hold that Wartnick is not a representative within the meaning of § 933(g) and the finding that Stadtmiller

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[3] Given the bases of our decision, we need not decide the contested issue whether Wartnick actually reached a settlement with Waldron.

did not ratify Wartnick's actions is supported by substantial evidence. Therefore, we DENY employer's petition to set aside the Board's order.

APPENDIX B

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 94-0439

BEATRICE STADTMILLER (Widow of DELBERT STADTMILLER)	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	OCT 31 1994
MALLOTT AND PETERSON	)	
and	)	
INDUSTRIAL INDEMNITY COMPANY	)	
Employer/Carrier-Petitioners	)	DECISION
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	and ORDER
Respondent	)	

Appeal of the Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Victoria Edises and Anne Landwehr (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration (92-LHC-2755) of Administrative Law Judge Paul A. Mapes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board held oral argument in this case in San Francisco, California, on August 4, 1994.

Decedent, who was exposed to asbestos while working for employer from 1940 through 1946, filed a claim

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*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

under the Act in June 1990 for asbestos-related cancer. He died from this work-related condition on December 21, 1990. Decedent's widow, the claimant in the current appeal, filed a claim for decedent's disability benefits and death benefits on her own behalf on December 10, 1991. 33 U.S.C. §§908, 909. In February 1993, the parties submitted a proposed stipulation, settling all issues then in dispute, and requested that the matter be remanded to the district director. The case was remanded on February 26, 1993. On March 5, 1993, however, the employer filed a motion for rescission of the stipulations and entry of summary judgment denying the claim. As a basis for this motion, employer alleged that it discovered that in 1992, claimant had entered into a settlement agreement with a third party, without receiving advance approval from employer. Accordingly, employer argued that claimant's right to compensation was barred under Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), based on this unauthorized settlement. In response to employer's motion, the administrative law judge issued an order vacating the order of remand and directed the district director to return the record to the Office of Administrative Law Judges. Claimant thereafter replied to employer's motion, urging that it be denied.

Claimant had filed a civil suit against several asbestos companies, including Waldron Duffy, Incorporated. She was represented in the third-party action by Harry Wartnick, an attorney representing numerous plaintiffs; claimant's claim against Waldron Duffy was consolidated with numerous similar actions brought by the other plaintiffs. Claimant asserted that she did not authorize Mr. Wartnick to settle her civil action, did not

sign any settlement agreement, and did not receive any settlement money. Claimant further stated that although Mr. Wartnick did receive funds from Waldron Duffy which were offered in return for a settlement of approximately 60 claims against the company, including claimant's suit, she had not been informed of the offer and had neither accepted nor rejected the proposed settlement. These representations were supported by a declaration signed by the claimant on March 8, 1993, and by Mr. Wartnick on March 19, 1993. Thereafter, claimant's counsel submitted a letter, asserting that no further inquiry into this matter was warranted and requesting that employer's motion be denied.

Employer replied to claimant's response, asserting that the representations of claimant and her attorneys were "highly suspect" and were contradicted by the fact that Mr. Wartnick had moved to dismiss claimant's civil action against Waldron Duffy, with prejudice, after he had received Waldron Duffy's settlement offer and funds. Employer also noted that the representations that claimant was not informed of the settlement offer were not consistent with the requirements of the California Business Professional Code that members of the state bar "promptly communicate" all settlement offers to their clients. Finally, employer emphasized that the provisions of Section 33(g) apply to settlements entered into by a claimant as well as settlements entered into by a claimant's "representative."

Based on the affidavits submitted by claimant and Mr. Wartnick denying that a settlement had occurred, the administrative law judge denied employer's motion for summary judgment and scheduled a hearing. Evidence

presented at the hearing indicated that Mr. Wartnick accepted two lump-sum checks from Waldron Duffy's carriers which were intended to cover compensation for the approximately 60 asbestos plaintiffs which the law firm represented. Tr. at 110. Of the amount tendered, $4,500 was supposedly earmarked for claimant. All of the money was placed in the law firm's trust account. While Mr. Wartnick did agree to file a dismissal of claimant's suit against Waldron Duffy, he testified that the attorney for the asbestos carrier, Mr. Jones, had also agreed that the dismissal would be vacated if claimant refused the settlement offer. Mr. Wartnick also testified that he agreed to sign requests for dismissals with the understanding that if a client rejected the offer, Waldron Duffy would reenter the litigation. This procedure was allegedly adopted to facilitate the handling of the large number of cases.[1] Moreover, Mr. Wartnick stated that the dismissal was filed "with prejudice" in error. Finally, the record reflects that on May 20, 1993, the order dismissing the lawsuit was vacated by the California Superior Court for Alameda County pursuant to a stipulation between claimant and Waldron Duffy. Cl. Ex. 5 at 124-125; Tr. at 98.

After the hearing, in an Order Denying Motion for Rescission of Stipulations, the administrative law judge found that neither claimant, nor her "representative" as that term is defined in Section 33(g), entered into a settlement agreement with Waldron Duffy. The administrative

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[1] Mr. Wartnick alleged that this practice was common in the California courts, condoned by them, and grew out of concern that a large percentage of recovery money went toward litigation rather than plaintiffs' recovery.

law judge further determined that claimant was not vicariously bound by the actions of her attorney inasmuch as Mr. Wartnick lacked actual or apparent authority to enter into the settlement on claimant's behalf and claimant had not ratified the unauthorized settlement. Accordingly, the administrative law judge concluded that as claimant was not bound by the unauthorized efforts of her counsel to settle her case, her right to benefits under the Act was not barred under Section 33(g). Accordingly, he found it unnecessary to decide whether Mr. Wartnick's actions, did, in fact, constitute the execution of a settlement. The administrative law judge further determined that even if, as employer contended, the dismissal with prejudice could not be vacated even with the consent of the parties because it became final under California law, and, as a result, employer might be unable to obtain any recovery from Waldron Duffy, the result would not be that claimant's claim is barred under Section 33(g) inasmuch as Section 33(g) applies only where a person "entitled to compensation" or that person's "legal representative" either directly or through the authorized actions of an attorney enters into an [sic] third-party settlement. In an Order Denying Motion for Reconsideration dated November 26, 1993, the administrative law judge reaffirmed his finding that Mr. Wartnick was not claimant's legal representative under Section 33(g) and that claimant had done nothing to ratify his unauthorized settlement.

On appeal, employer, incorporating its post-trial brief, argues that claimant's attorney in the civil lawsuit, Harry Wartnick, is her "representative" as that term is used in Section 33(g) and that because a settlement occurred under California law, claimant is precluded

from receiving benefits under the Act. Employer argues, in the alternative, that under California agency law, claimant is bound by the actions of her attorney, who dismissed the civil action against Waldron Duffy with prejudice, and cashed the settlement check and retained the proceeds, conduct consistent with the execution of a settlement. Employer further avers that the California Superior Court for Alameda County lacked subject matter jurisdiction to vacate the dismissal of claimant's civil action on May 20, 1993, because under Section 473 of the California Code of Civil Procedure such an action had to have been instituted within six months of the initial order of dismissal.

Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond that the administrative law judge properly found that Section 33(g) was inapplicable on the bases that claimant did not execute a third-party settlement, Mr. Wartnick was not her legal representative under Section 33(g), and she was not otherwise bound by his unauthorized actions. They thus assert that his Order Denying Motion for Rescission should be affirmed. Both employer and claimant have filed reply briefs which essentially reiterate the arguments made in their other briefs.

"Representative" Under Section 33(g)

Initially, we reject employer's assertion that Harry Wartnick, claimant's counsel in the third-party suit, was her "representative" as that term is used in Section 33(g)(1) of the Act. Section 33(g)(1), as amended in 1984, states:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the district director within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1) (1988). In his Order Denying Employer's Motion for Reconsideration, the administrative law judge considered and rejected employer's argument, which it reiterates on appeal, that the term "representative" in subsection 33(g) includes attorneys, as other sections of the Act and other laws enacted by Congress use the term "representative" to refer to attorneys.

In so concluding, the administrative law judge noted that Section 33(c) of the Act, 33 U.S.C. §933(c), explicitly states that as used in Section 33, the term "representative" shall mean the "legal representative" of a decedent. He reasoned that since statutory terms should be given their ordinary meaning, and "legal representative" is a term that ordinarily does not include attorneys, Congress thereby indicated that it did not intend to include attorneys in the term "representative." The administrative law

judge further determined that interpreting the term "representative" to mean "legal representative" of the decedent allows for a reasonable interpretation of the portion of Section 33(g)(1) which refers to a settlement with a third person "for an amount less than the *compensation to which the person (or the person's representative) would be entitled* under this Act." (emphasis added). The administrative law judge noted that if this portion of Section 33(g) were interpreted as referring to attorneys, as urged by the employer, this provision would not make any sense, as attorneys can only recover attorney's fees, but are never entitled to recover "compensation," defined in subsection 2(12) of the Act as "the money allowance payable to an employee or his dependents." 33 U.S.C. §902(12). Finally, the administrative law judge relied upon *Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517 (11th Cir. 1987), and *Mobay Chemical Company v. Hudson Foam Plastics Corp.*, 277 F. Supp. 413 (S.D.N.Y. 1967). Both cases involve interpretation of Federal Rule of Civil Procedure 60(b) which states that a "court may relieve a party or his legal representative from a final judgment, order, or proceeding. . . . " In both cases, the court recognized that a legal representative is one who stands in the place of, or instead of, another such as an heir at law and does not include legal counsel within the context of the attorney-client relationship. *Kem*, 817 F.2d at 150; *Mobay*, 277 F.Supp. at 416.

Employer argues on appeal that while "legal representative" most commonly denotes an executor or administrator of an estate, according to Black's Law Dictionary, the term is given different meanings in differing contexts. Employer asserts that the administrative law judge erred

in construing the term narrowly in interpreting Section 33(g). Citing *Graves v. United States Coast Guard*, 692 F.2d 91 (9th Cir. 1982), employer contends that "legal representative" may include an attorney and that the administrative law judge erred in concluding otherwise. Employer further asserts that Section 33(c) is not even applicable in the present case, because it deals only with the situation where a death occurs without survivors, in which case the compensation payments are made to the Special Fund. Employer asserts that in such a case the person entitled to compensation is the administrator of an estate and thus his or her "representative" cannot also be the administrator. Citing *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), employer contends that because the term "representative" is used in Section 33(g) rather than "legal representative," the administrative law judge erred in failing to interpret the term "representative" consistent with its usage elsewhere in the statute. Finally, employer asserts that if the term "representative" in Section 33(g) is not interpreted to include an attorney, the purpose of 33(g), i.e., the protection of employer, will be frustrated, since if interpreted otherwise, "an attorney may do that which a claimant may not."

We reject employer's argument that Mr. Wartnick was claimant's "representative" for purposes of Section 33(g). The administrative law judge's construction is consistent with the plain language of the statute, which, as stated in *Cowart*, is the starting point of statutory construction. In *Cowart*, the Court found that its interpretation of the term "person entitled to compensation" in Section 33(g)(1) was reinforced by the fact that the term

as it appeared elsewhere in the statute could not bear the meaning placed on it by claimant. *Cowart*, ___ U.S. ___, 112 S.Ct. at 2596, 26 BRBS at 52 (CRT). Moreover, where, as here, the statute as written is clear, the Court held that effect must be given to the plain language. See *Cowart*, ___ U.S. ___, 112 S.Ct. at 2594, 26 BRBS at 51 (CRT).

Section 33(c) explicitly refers to the "assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative')" when an employee dies without statutory dependents. 33 U.S.C. §933(c). The term "representative" next appears in subsection (g)(1). Therefore, the logical interpretation of the plain language is that "representative" in subsections following subsection (c) means "legal representative of the deceased." That the term "representative" may be used in other contexts elsewhere in the statute is irrelevant in light of this clear directive. Moreover, as was noted by the administrative law judge, interpreting the term "representative" in this manner allows for a reasonable reading of the portion of Section 33(g)(1) which refers to entering into a third-party settlement for an amount less than the compensation to which the "person (or the person's representative)" would be entitled. While a legal representative of the decedent may receive compensation, his attorney cannot. Finally, the administrative law judge's interpretation accords with a basic tenet of statutory construction: the specific takes precedence over the general. See, e.g., *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT) (2d Cir. 1993); *McPherson v. National Steel and Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992); see generally *Markair, Inc. v. Civil Aeronautics Board*, 744 F.2d 1383 (9th

Cir. 1984). In addition, the administrative law judge's interpretation of the term "representative" as being limited to legal representatives of a decedent who would be entitled to recover compensation under the Act is consistent with *Mobay* and *Kem*, and his decision to credit these cases over the cases relied upon by the employer was rational. See generally *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

While employer contends that *Graves*, 692 F.2d at 71, mandates a contrary interpretation, we disagree. In *Graves*, a quadriplegic brought a claim under the Federal Tort Claims Act, which was signed by his attorney because plaintiff allegedly could not write himself due to injuries he sustained in a diving accident. In rejecting the government's argument that the case should be dismissed because the documents were signed by the attorney without evidence of his authority to do so, the court interpreted a portion of a regulation which read:

> A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

28 C.F.R. 14.3(e) (emphasis added). Although employer argues that *Graves* demonstrates that in the Ninth Circuit an attorney is a legal representative, this result does not follow. The attorney in *Graves* may have, in fact, been

acting as the agent of the physically incapacitated claimant, an interpretation bolstered by the court's later discussion of agency law. 692 F.2d at 74. Accordingly, the administrative law judge's finding that claimant's civil attorney was not her "representative" as that term is used in Section 33(g)(1) of the Act is affirmed.

Agency

In light of our determination that the administrative law judge properly found that Mr. Wartnick was not claimant's "legal representative," we must next address employer's argument that claimant's claim is barred under Section 33(g) on the basis that claimant was bound by Mr. Wartnick's actions on agency principles. Initially, the administrative law judge found that under applicable California law, the attorney may bind the client in three circumstances: where the attorney has actual authority to enter the settlement, the attorney has apparent authority, or an unauthorized settlement is later ratified by the client. Employer does not challenge the administrative law judge's findings that Mr. Wartnick lacked either actual or apparent authority to enter into the third-party agreement. Instead, employer reiterates the argument it made below that the settlement was ratified and thus claimant was vicariously bound by Mr. Wartnick's actions in entering into the unauthorized settlement because she did not take immediate action to repudiate his actions, such as firing him.

Generally, the attorney-client relationship, insofar as it concerns authority of the attorney to bind his client by

agreement or stipulation, is governed by agency principles. *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 212 Cal. Rptr. 151, 696 P.2d 645 (1985). As the administrative law judge found, under California law, "the client as principal is bound by the acts of the attorney-agent within the scope of his actual authority (express or implied); or his apparent or ostensible authority; or by unauthorized acts ratified by the client." *Id.*; *Yanchor v. Kagan*, 22 Cal. App. 3d 544, 549, (1971). An attorney is not authorized merely by virtue of his retention in litigation, to "impair the client's substantial rights on the course of action itself." *Blanton*, 38 Cal. 3d at 404, 212 Cal. Rptr. at 156, 696 P.2d at 650, quoting *Linsk v. Linsk*, 70 Cal. 2d 272, 276 (1969). The law is well settled that an attorney must be specifically authorized to settle and compromise a claim; he has no ostensible authority merely on the basis of his employment to bind his client to a compromise settlement of pending litigation. *Id., citing Whittier Union High School Dist. v. Superior Court*, 66 Cal. App. 3d 504, 508 (1977); *Linsk*, 70 Cal. 2d at 278. It is also a well-settled rule of agency that a principal will be held to have ratified the agent's actions where he voluntarily accepts the benefits of the unauthorized transaction. *Alvarado Community Hospital v. Superior Court of San Diego City*, 173 Cal. App. 3d 476, 481, 219 Cal. Rptr. 52, 54 (1985), citing RESTATEMENT (SECOND) OF AGENCY §98 (1958). The receipt, by a purported principal who knows the facts, of things to which he would not be entitled unless the transaction were ratified, indicates his consent to become a party to the transaction as it was made. *Id.*, 173 Cal. App. 3d at 482, 219 Cal. Rptr. at 55. *See, e.g., Fidelity and Casualty*

Company v. Abraham, 70 Cal. App. 2d 776, 161 P.2d 689 (1945).

Employer's ratification argument is rejected. On the facts presented in the present case, the administrative law judge rationally found that claimant did not ratify the agreement in question because she had not been fully informed about the unauthorized acts of her counsel and did not obtain any benefit from his actions. *Horner v. Ferron*, 362 F.2d 224, 231 n.10 (9th Cir. 1966). Employer argues on appeal, as it did below, that claimant's March 8, 1993, declaration in which she indicated that she had not authorized Mr. Wartnick to settle her civil action is sufficient to establish that claimant knew of the settlement by that date. Employer contends that inasmuch as she testified that she did not discuss this subject again with her attorney until May 25, 1993, two-and-a-half months later, she ratified the agreement by her inaction. We disagree.

In rejecting this argument, the administrative law judge reasonably determined that while claimant's deposition and written declaration indicate that she had not authorized Mr. Wartnick to settle her civil case and thus had some knowledge of the attempted settlement, these documents fail to establish that claimant was aware of the key details of the agreement. Specifically, they do not establish that she was aware that Mr. Wartnick had dismissed her action against Waldron Duffy with prejudice or that he received $4,500 in settlement funds. Likewise, although Mr. Wartnick testified that an unidentified person in his office allegedly informed claimant of "an offer" of $4,500 from Waldron Duffy, the administrative law judge reasonably found that this testimony was not sufficient to establish that claimant was contacted, given that

Mr. Wartnick could not specify who made the call or when it was made and that the only offer claimant could recall was for $20,000 in connection with her Longshore claim. Dep. of Cl. at 16-17. The administrative law judge also rationally reasoned that even if claimant had been fully informed of Mr. Wartnick's unauthorized actions, it is unlikely that she would have understood their legal implication, noting that even the attorneys involved denied that there was a settlement and that claimant would have relied on their assertions. Finally, the administrative law judge properly found that the law does not require a client to fire her attorney to avoid ratification of unauthorized acts and that claimant's refusal to sign a release, her repudiation of the agreement and her refusal to accept the money were actions inconsistent with ratification. Because the administrative law judge's finding that claimant did not ratify the purported settlement is rational, supported by the record, and in accordance with law, it is affirmed. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 61-62 (1992). Accordingly, as Mr. Wartnick was not claimant's legal representative, claimant did not enter the agreement herself, and claimant was not otherwise bound by Mr. Wartnick's actions on agency principles, the administrative law judge's finding that Section 33(g) is inapplicable on the facts presented is also affirmed.

Settlement

Finally, employer argues that regardless of the intent of the parties, Mr. Wartnick's actions resulted in the execution of a settlement and dismissal of the civil action. In support, employer cites a communication by Roderic Jones, counsel for Waldron Duffy, to his clients that "we have settled," and his request that settlement drafts be prepared which would be provided to Mr. Wartnick in exchange for either releases or dismissals, in support of its assertion. Employer also points out that claimant's civil attorney dismissed the civil action against Waldron Duffy with prejudice and cashed the settlement checks and retained the proceeds for eight-and-a-half months, indicia of an executed agreement under California law.[2] Employer further avers that the California Superior Court for Alameda County lacked subject matter jurisdiction to vacate the dismissal of the lawsuit because under California law, such an action must be taken within six months of the dismissal. Finally, employer contends that claimant's reliance on *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992), and *Rosario v. M. I. Stevedores*, 17 BRBS 50 (1985), in support of its argument that no settlement occurred, is misplaced.

Claimant responds that the fact that her civil counsel received a lump sum settlement check for all civil offers made by Waldron Duffy and then mistakenly allowed a dismissal with prejudice to be filed does not indicate that

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[2] The evidence indicates that two checks totaling $180,750 were sent to Mr. Wartnick's law firm from two carriers for Waldron Duffy to cover the purported settlement for the 60 plaintiffs represented by the law firm. Emp. Ex. H at 99, 104.

a settlement occurred, inasmuch as these actions were transient; the monies were ultimately returned and the dismissal of the claim was ultimately vacated by the Superior Court. Citing Chavez and Rosario, claimant asserts that employer errs in equating a dismissal which was subsequently vacated with an executed settlement and that such circumstantial evidence of a settlement does not mandate a finding of a third-party settlement, where, as here, there is overwhelming evidence to the contrary.

In the present case, the administrative law judge properly determined that it was unnecessary for him to reach this issue in light of his conclusions that Mr. Wartnick was not claimant's legal representative for Section 33(g) purposes and that she was not otherwise bound by his unauthorized efforts to settle the civil claim. Because we are affirming the administrative law judge's findings in this regard, we also need not reach this issue; even if a settlement did occur, it would not be binding on the claimant. Nonetheless we note that in *Chavez*, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, refused to find a third-party settlement occurred exclusively on the basis of documentary evidence, including formal court papers suggestive of the existence of a settlement where, as here, there was countervailing evidence indicating otherwise. In *Chavez*, claimant brought a claim for longshore compensation for an asbestos-related injury as well as a civil suit against various asbestos manufacturers, suppliers, and distributors. Two of the defendants in the third-party action were Keene Corporation and Armstrong World Industries, Inc. Chavez's claims were consolidated with

numerous civil actions against the same defendants brought by other plaintiffs. An order, with Chavez named as the lead plaintiff, was filed in a California Superior Court purportedly approving a "good faith settlement" between Keene and the asbestos plaintiffs, including Chavez. In refusing to find a settlement by claimant in *Chavez*, the court acknowledged that the court order "approving" Keene's settlement with Chavez was "circumstantial evidence from which the inference could be drawn" that Chavez had settled his case with Keene. *Chavez*, 961 F.2d at 1413, 25 BRBS at 140 (CRT). The Ninth Circuit acknowledged as well that a letter written by Armstrong's lawyer and "agreed and acknowledged" by Chavez's lawyer, which recited that Chavez's case against Armstrong had been settled, could also be circumstantial evidence of the existence of a settlement between Chavez and Keene. The *Chavez* court nonetheless concluded that the existence of such evidence did not require a finding of a settlement for purposes of Section 33(g) where, as in the present case, claimant, claimant's attorney, and the third-party defendant's attorney testified that no settlement had occurred, that no release had been signed, and that no funds had been received by the claimant. *Chavez*, 961 F.2d at 1413, 25 BRBS at 140 (CRT). A similar result was reached by the Board in Rosario, 17 BRBS at 50.

In this case, there is documentary evidence of an order vacating the dismissal of the suit, as well as testimony from claimant, Mr. Wartnick, and Mr. Jones, counsel for Waldron Duffy, to the effect that no settlement had occurred. It would thus appear that pursuant to Chavez and Rosario, there was no settlement on the facts presented, as a matter of law. While employer alleges that

the dismissal was not properly vacated because the action was not taken within the six-month period required by California law, this administrative proceeding is not the proper forum to raise this argument. Orders of a state court are not generally subject to collateral attack before the Board. *See generally Hudson v. Puerto Rico Marine, Inc.*, 27 BRBS 183, 186-187 (1993). Finally, although employer suggests that it will somehow be prejudiced if the claimant is not bound to the settlement, we disagree. Section 33(g) was intended to protect the employer from the injured employee's acceptance of too little for his cause of action. *See Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968), *reh'g denied*, 391 U.S. 929 (1968). Where claimant has yet to settle her third-party claim, employer can suffer no prejudice for Section 33(g) purposes.

Accordingly, the administrative law judge's Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER, Acting
Chief Administrative Appeals
Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Robert J. Shea
ROBERT J. SHEA
Administrative Law Judge

APPENDIX C

U.S. Department of Labor

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In the Matter of BEATRICE STADTMILLER (widow of Delbert Stadtmiller), Claimant, v. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Insurer.	Case No. 92-LHC-2755 OWCP No. 13-87454

Appearances:

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Before: Paul A. Mapes
Administrative Law Judge

ORDER DENYING MOTION FOR RESCISSION OF STIPULATIONS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act" or the "Longshore Act"), 33 U.S.C. §901 *et seq.* The claimant is the widow of a deceased longshore worker who allegedly acquired a fatal asbestos-related illness while doing work subject to the provisions of the Longshore Act. In February of 1993 the parties submitted proposed stipulations settling all issues then in dispute and requested that the matter be remanded to the District Director. Accordingly, on February 26, 1993, the matter was remanded. However, on March 5, 1993, the employer/insurer (hereinafter, "the employer") filed a motion seeking rescission of the stipulations and entry of a summary judgment order denying the claim in its entirety. As grounds for such motion counsel for the employer represented that he had just discovered information indicating that sometime in 1992 the claimant, without receiving the advance approval of the employer, had entered into an agreement settling a law suit she had previously initiated against Waldron Duffy, Inc., for the wrongful death of her husband. In its motion the employer contended that pursuant to the provisions of subsection 33(g) of the Act such an unauthorized settlement precludes the claimant from any entitlement to Longshore Act benefits.

In view of the employer's motion, on March 10, 1993, I issued an order vacating the order of remand and directing the District Director to return the record in this case to the Office of Administrative Law Judges.

On March 15, 1993, the claimant filed a reply to the employer's motion. In the reply the claimant represented that she had not authorized her attorney in the wrongful death action to settle her civil lawsuit against any asbestos manufacturer, had not signed any civil settlement papers, and had not received any civil settlement monies. It was further represented that the attorney representing the claimant in the civil suit, Harry Wartnick, had received funds from Waldron Duffy that were offered in return for a settlement of the claimant's civil case, but that the claimant had not been informed of the offer and had neither accepted or rejected the proposed settlement. These representations were supported by a declaration signed by the claimant on March 8, 1993, and by a declaration signed by Mr. Wartnick on March 19, 1993. On April 13, 1993, the claimant's counsel submitted a letter asserting that no further inquiry into this matter was warranted and requesting that the employer's motion be denied.

In an April 14, 1993 reply to the claimant's response, the employer asserted that the representations of the claimant and her attorneys were "highly suspect" and indicated that the employer desired to take depositions in order to enquire further into these representations. The employer went on to argue, in effect, that the representations of the claimant and Mr. Wartnick that no settlement had occurred were contradicted by the fact that Mr. Wartnick moved to dismiss the claimant's civil action against Waldron Duffy with prejudice after he received Waldron Duffy's settlement offer and funds. The employer also noted that the representations that the claimant had been unaware of the settlement offer were inconsistent with

the California Business and Professional Code's requirement that members of the state bar "promptly communicate" all settlement offers to their clients. In addition, the employer emphasized that the provisions of section 33(g) apply both to settlements entered into by a claimant and settlements entered into by a claimant's "representative."

Since both the claimant and Mr. Wartnick submitted affidavits denying that any settlement occurred, I concluded that there was a genuine issue of material fact and that therefore an order of summary judgment could not be issued. Accordingly, on April 16, 1993, I issued an order denying the employer's motion for summary judgment and scheduling this matter for an evidentiary hearing. The hearing was held in San Francisco, California, on June 22, 1993. At the hearing both the claimant and the employer were represented by counsel and the following exhibits were admitted into evidence: Employer Exhibits (EX) A-H; Claimant Exhibits (CX) 1-6. At the conclusion of the hearing counsel for both parties agreed that the previously-approved stipulations would control the resolution of this claim should it be determined that the claim is not barred under the provisions of subsection 33(g). Tr. at 137-38.

SUMMARY OF THE EVIDENCE

The relevant evidence consists of various documentary exhibits and the testimony of five witnesses.

A. Summary of Documentary Evidence

The record contains six documents relating to a possible unauthorized settlement of the claimant's civil action against Waldron Duffy.

The first two relevant documents are letters from Victoria Edises, the attorney representing the claimant in her action under the Longshore Act, to Mr. Wartnick. In the first of these letters, which is dated April 16, 1992, Ms. Edisis advised Mr. Wartnick that as a claimant under the Longshore Act Mrs. Stadtmiller "cannot accept any civil settlements without the consent of the longshore compensation insurance carrier," and requested that she be advised if any offers were received so that approval of such a settlement might be requested from the longshore carrier. CX 3 at 122. The second letter to Mr. Wartnick from Ms. Edises was sent on June 9, 1992, and essentially repeated the statements made in the April 16 letter. CX 4 at 123.

The next relevant document is an August 4, 1992 letter from Roderick D. Jones, an attorney representing the defendant in the claimant's civil action against Waldron Duffy, to the company's two insurance carriers – The Ohio Casualty Group and Hanover Insurance Company. The letter stated that Mr. Jones had "settled" 60 cases against Waldron Duffy for a total of $180,750. The letter also stated that the names of the cases were itemized on an attached "settlement list" and requested checks "which we will exchange for the properly executed releases and/or dismissals." EX H at 106. A excerpt from the attached "settlement list" set forth the figure $4500 next to the name Stadtmiller. EX H at 106, 108.

The next two documents are copies of checks issued on behalf of The Ohio Casualty Group and Hanover Insurance Company. The check for Ohio Casualty was in the amount of $120,500 and was made payable to Mr. Wartnick's law firm "in trust for various asbestos plaintiffs." EX H at 104. The check issued on behalf of Hanover Insurance Company was in the amount of $60,250 and was also payable to Mr. Wartnick's law firm "in trust for various asbestos plaintiffs." EX H at 99. The Ohio Casualty check was dated August 14, 1992, and the Hanover check was dated August 21, 1992.

The next to the last document is a Request for Dismissal that was filed with the Alameda County (California) Superior Court in the case of Beatrice Stadtmiller v. Raybestos-Manhattan, Inc., et al. on September 8, 1992. The Request for Dismissal is signed by Mr. Wartnick and specifies that the dismissal should apply only to Waldron Duffy and should be "with prejudice." EX A. The document shows that the dismissal was granted on September 11, 1992.

The final document is a stipulation between Beatrice Stadtmiller and Waldron Duffy that was filed on May 20, 1993, in the Alameda County Superior Court. It requested that the September 11, 1992 dismissal of Mrs. Stadtmiller's civil action against Waldron Duffy be vacated and set aside. CX 5 at 124-25. The stipulation was signed by Mr. Wartnick on behalf of Mrs. Stadtmiller and by Mr. Jones on behalf of Waldron Duffy. Pursuant to this stipulation the dismissal of the claimant's civil action against Waldron Duffy was vacated by the Superior Court on May 21, 1993. Tr. at 98.

B. Summary of Testimonial Evidence

The following is a summary of the relevant testimony of each of the witnesses.

Harry Wartnick Mr. Wartnick testified that he began representing the claimant in her civil action after the case was referred to him in the Spring of 1992 by the firm representing the claimant in her Longshore Act claim. Tr. at 48. During his testimony, Mr. Wartnick acknowledged that he had engaged in negotiations with Mr. Jones concerning possible settlement of a group of 59 or 60 asbestos cases against Waldron Duffy and that the group included Mrs. Stadtmiller's case. Tr. at 69. He further admitted that as a result of these negotiations Mr. Jones made an offer to settle the Stadtmiller case for $4500. Tr. at 69. He also acknowledged that as a result of his negotiations with Mr. Jones the insurers for Waldron Duffy sent checks to his firm which included the $4500 for the settlement of the Stadtmiller case, and that this money was not returned to the insurers until May of 1993 when he and Mr. Jones agreed to have the dismissal of Mrs. Stadtmiller's action against Waldron Duffy vacated. Tr. at 59, 99. Mr. Wartnick further admitted that he had signed the Request for Dismissal of Mrs. Stadtmiller's civil action "anticipatory" of the client accepting Waldron Duffy's offer. Tr. at 63. Mr. Wartnick described his decision to allow the dismissal to be granted "with prejudice" as a "mistake," and said that he routinely agrees to dismissals without prejudice based on settlement offers alone and without receiving the advance approval of his clients. Tr. at 64, 68, 70.

Mr. Wartnick, however, refused to characterize his actions as constituting a settlement of the claimant's civil

action against Waldron Duffy. Tr. at 51, 109. Rather, he viewed his discussions with Mr. Jones as merely constituting negotiations for the purpose of arriving at an offer that he could recommend to his client. Tr. at 52, 59, 66. In this regard, he contended that he never had any authority from Mrs. Stadtmiller to settle any part of her civil case. Tr. at 49, 50. He also noted that he had never sent releases to Mrs. Stadtmiller for her signature and had held the $4500 in a trust account rather than distributing it to Mrs. Stadtmiller. Tr. at 50, 53, 70. Mr. Wartnick also expressed the opinion that a signed release is necessary to settle a case and testified that in his experience all asbestos defendants but one insist on receiving signed releases before settlement funds are distributed to clients. Tr. at 74, 77, 79. He also asserted that Mr. Jones insists on receiving such a release before funds are disbursed to a client. Tr. at 74. Mr. Wartnick further testified that it was his "understanding" with Mr. Jones that the dismissal of Mrs. Stadtmiller's civil action would be set aside if Mrs. Stadtmiller rejected the offer. Tr. at 63. He also stated that Mrs. Stadtmiller had rejected the offer and that, as a result, Mr. Jones "did honor the discussions and agreement that we had." Tr. at 64. Although Mr. Wartnick asserted that Mrs. Stadtmiller had in fact considered and rejected the settlement offer in April or May of 1993, he admitted that he did not communicate with Mrs. Stadtmiller directly and did not know who in his firm had done so. Tr. at 99, 102, 103, 117, 119.[1]

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[1] At one point during his testimony Mr. Wartnick indicated that "we," (presumably his law firm) "did not talk directly" to Mrs. Stadtmiller about the offer and had instead communicated the offer to the law firm that is handling Mrs. Stadtmiller's

Roderick D. Jones The testimony of Mr. Jones was taken by deposition on May 27, 1993. During the deposition Mr. Jones testified that during the late summer of 1992 he had negotiated with Mr. Wartnick concerning the possible settlement of a group of cases against Waldron Duffy, including Mrs. Stadtmiller's. EX F at 60-61. Mr. Jones also indicated that as a result of the negotiations he and Mr. Wartnick achieved "some sort of an understanding" about how much money Waldron Duffy would pay to settle the group of cases. EX F at 61. The understanding encompassed both the total amount and the amount to be paid on each individual case, although Mr. Jones also indicated that he didn't really care how Mr. Wartnick divided up the total amount among the individual plaintiffs. EX F at 62. Thereafter, Mr. Jones believes, his firm prepared the Request for Dismissal in the Stadtmiller case and arranged to have it signed by Mr. Wartnick before the checks from the insurance company were sent to Mr. Wartnick's firm. EX F at 58, 65. Mr. Jones also indicated that at the time he agreed with Mr. Wartnick on the $4500 settlement amount for the Stadtmiller case he was not sure whether Mr. Wartnick had the authority to settle Mrs. Stadtmiller's case or whether Mr. Wartnick was just agreeing to recommend that settlement amount to his client. EX F at 77. However, he also testified that the Request for Dismissal was filed because he thought there was a settlement and that he thereafter thought that the matter had been "laid to rest." EX F at 83, 69.

Longshore Act claim. Tr. at 100. It appears from the context, however, that this statement only applied to the period between the receipt of the offer in August of 1992 and late March of 1993. *Id.*

After the dismissal of Mrs. Stadtmiller's case, Mr. Jones testified, he heard nothing more concerning the matter until May of 1993 when he received two telephone calls from Mr. Wartnick. During those calls he was informed by Mr. Wartnick that Mrs. Stadtmiller had refused to sign a release. EX F at 58, 67-68. At the same time, he testified, Mr. Wartnick asked him if he would sign a stipulation to have the dismissal of Mrs. Stadtmiller's case vacated. EX F at 68-69. Mr. Jones testified that he responded to this request by expressing concern about exposing his client to additional litigation or cost. EX F at 69. Ultimately, Mr. Jones testified, he agreed to enter into the stipulation "with the understanding that we couldn't enter into any negotiations again to settle the case once the longshoreman's case had been resolved." EX F at 69. This means, Mr. Jones explained, that he does not anticipate having any future discussions about the merits of the Stadtmiller claim and that "[i]t's going to be the amount that we paid before." *Id.* He said he believes that Mr. Wartnick has the same understanding, although there is nothing in writing to memorialize that understanding. EX F at 70. Mr. Jones also indicated that his firm has received a check from Mr. Wartnick's firm for the exact amount that was allocated for the settlement of Mrs. Stadtmiller's case. EX F at 71.

Mr. Jones also testified that although his firm requires opposing counsel to provide signed dismissal requests before a settlement check is delivered to the opposing counsel, formal written and signed releases "come later." EX F at 65. Mr. Jones responded affirmatively when asked if it is his understanding that the agreement he made with Mr. Wartnick was "contingent"

upon receiving signed releases from Mrs. Stadtmiller and the other plaintiffs in that case. EX F at 77, 78. He further testified that it is his "custom and practice" not to consider a settlement complete unless there is a written release. EX F at 77. He acknowledged, however, that there may be some cases in his office in which a written release was never received. EX F at 78. He then added that "as long as I have the dismissal I feel somewhat comfortable." *Id.* He also indicated that it is his opinion that under California law a settlement is unenforceable without a written settlement agreement. EX F at 75.

Beatrice Stadtmiller The testimony of Mrs. Stadtmiller was taken by deposition on May 25, 1993. Her testimony indicates that she was 75 years old at the time the deposition was taken. CX 1 at 4. In her testimony she also indicated that she had never directly given anyone at Mr. Wartnick's firm any instructions of any sort concerning the firm's authority to settle her civil case, but was aware that her attorney in the Longshore Act case had instructed Mr. Wartnick not to enter into any settlement agreements without the consent of the insurer for the Longshore Act employer. CX 1 at 19, 22. Mrs. Stadtmiller also testified that although she had never spoken to Mr. Wartnick about any settlement of her civil case, she believed she had been contacted by a woman in Mr. Wartnick's firm who asked her if she would take $20,000 for her case. CX 1 at 18, 15-17. Mrs. Stadtmiller stated that she had told the woman that she would refuse to accept that amount. CX 1 at 16-17. She was unsure, however, when the call occurred and was unable to recall any other details about the conversation. *Id.* Her testimony also indicated that she had not received any money from her

civil law suit and had never authorized dismissing any of the defendants in that law suit. CX 1 at 20. She also said she had "no idea" about the current status of that case. CX 1 at 19.

Irine Dennie and Norman Gordon Irine Dennie is a claims manager for the insurer in the Longshore Act case and Norman Gordon is a legal assistant in the law firm representing the employer and insurer in that case. Ms. Dennie testified that she has responsibility for the Stadtmiller claim and that no one had requested her consent to any third-party settlement in connection with that claim. Tr. at 123. Likewise, Mr. Gordon testified that he is familiar with his law firm's files on the Stadtmiller claim and indicated that the firm had never received notice from any of Mrs. Stadtmiller's attorneys concerning a proposed settlement of Mrs. Stadtmiller's civil case. Tr. at 130-31.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Subsection 33(g) of the Longshore Act provides that if "a person entitled to compensation (or the person's representative) enters into a settlement" with a third party tortfeasor for an amount less than the compensation to which "the person (or the person's representative)" would be entitled under the Act, the person shall forfeit his or her right to compensation unless the responsible employer and insurance carrier grant written approval to the settlement "before the settlement is executed." *See also Estate of Cowart v. Nicklos Drilling Co.*, ___

U.S. ___, 112 S. Ct. 2589 (1992). Thus, the foregoing statutory language in effect provides that a claim for compensation will be barred under subsection 33(g) if two preconditions are satisfied. First, a person entitled to compensation or the person's "representative" must enter into a settlement with a third person. Second, the settlement must be "executed" before written authorization is obtained from the responsible employer and insurance carrier.

It is clear from the evidentiary record that the claimant did not herself directly enter into a settlement agreement with Waldron Duffy. It is also clear that no "representative," as that term is used in subsection 33(g) is involved in this case.[2] Thus, it may appear that no one within the scope of the statutory language has entered into a settlement agreement that could preclude the claimant from recovering benefits under the Act. The employer contends, however, that even though the claimant may not have directly entered into a settlement, she is vicariously bound by the actions of her attorney, Mr. Wartnick, who, the employer alleges, did settle the claimant's civil action against Waldron Duffy without first

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[2] This is established by the fact that subsection 33(c) of the Act explicitly states that the word "representative" will be used in section 33 to mean "legal representative." According to Black's Law Dictionary, a "legal representative" is a "person who oversees the legal affairs of another." The examples given include executors of estates and court-appointed guardians, but do not include attorneys at law. Hence, I conclude that as used in section 33 the term "representative" does not include attorneys at law unless they are acting as executors, court-appointed guardians or in some similar capacity.

obtaining the approval of the employer and insurer. Consequently, two issues have been raised: (1) can the claimant be bound for purposes of applying subsection 33(g) by the actions of her attorney, and (2) if so, did the claimant's attorney in fact execute a settlement without obtaining the advance approval of the employer and insurance carrier.

A. Attributing Actions of the Attorney to the Claimant

It is obvious that if a claimant could avoid the requirements of section 33 merely by authorizing an attorney enter into a settlement with a third-party tortfeasor, subsection 33(g) would fail to achieve its legislative purposes. Accordingly, I conclude that the actions of an attorney should be attributed to a claimant if necessary to achieve the purposes of section 33. When it is recognized that the primary purpose of subsection 33(g) is to preclude claimants from entering into settlement agreements with third-party tortfeasors that might adversely affect the interests of employers and their insurers, it is [sic] becomes clear that the appropriate standard under section 33 for determining when a claimant should be bound by the settlement-related actions of the claimant's attorney is the standard that would be applied by the court having jurisdiction over the civil action against the third-party tortfeasor.

In this case, the claimant's civil action is under the jurisdiction of the state courts of California and therefore California state law has to be applied to determine whether the settlement-related actions of Mr. Wartnick

are binding on the claimant. The leading California state court decision on the authority of an attorney to bind a client to a proposed settlement is the *en banc* decision of the California Supreme Court in *Blanton v. Womancare, Inc.*, 212 Cal. Rptr. 151, 38 Cal.3d 396, 696 P.2d 645 (1985). In that decision the court held that a client can be bound to a settlement entered into by the client's attorney in only three circumstances: (1) if the attorney was acting within the scope of his or her actual authority (express or implied), (2) if the attorney was acting with apparent or ostensible authority, or (3) if an unauthorized settlement was later ratified by the client. 696 P.2d at 649. After applying these criteria to the facts of this case, I conclude for the reasons set forth below that the claimant has not been bound under California law by Mr. Wartnick's efforts to settle her claim against Waldron Duffy.

1. Actual Authority

As explained in the *Blanton* decision, in California an attorney may bind a client to a settlement if the attorney has actual authority to enter into the settlement. Such authority may be either express or implied. However, the evidence in this case clearly shows that the claimant did not on any occasion give Mr. Wartnick either type of actual authority to settle her civil action. For example, the evidence is uncontradicted that the claimant never gave Mr. Wartnick express authority of any kind with regard to the possible settlement of her civil action. Indeed, the evidence indicates that the claimant's counsel in the Longshore Act claim specifically directed Mr. Wartnick not to settle any civil claims without the advance

approval of the Longshore insurer. Likewise, nothing in the record indicates that the claimant ever did or said anything that would suggest that she was implicitly granting Mr. Wartnick actual authority to settle her civil claim. Although the employer appears to contend that the claimant's mere retention of Mr. Wartnick as an attorney implicitly conferred on Mr. Wartnick the authority to settle the claimant's civil case, this contention is clearly in error. In *Blanton* the court held that under California law an attorney is not authorized "merely by virtue of his retention in litigation, to 'impair the client's substantive rights or the cause of action itself.' " *Id.* at 650. Thus, the court noted, " 'the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation.' " *Id.*

2. Apparent Authority

Even though the claimant did not give Mr. Wartnick either express or implied actual authority to settle her civil case, she could still be bound under California law by Mr. Wartnick's settlement actions if Mr. Wartnick had the apparent authority to enter into such a settlement. According to the California Supreme Court's decision in *Blanton*, "apparent authority is created, and its scope defined, by the acts of the principal in placing the agent in such a position that he appears to have the authority which he claims or exercises." *Id.* at 651. The only act that the claimant has taken that may have arguably given Mr. Wartnick the apparent authority to settle her civil claim

was the act of retaining Mr. Wartnick to represent her in the civil action. The court in *Blanton*, however, held that such conduct alone is not sufficient to confer on an attorney apparent authority to settle a civil claim or even to commit a client to binding arbitration. *Id.* at 652-53. Thus, the court quoted with approval the statement that "when it comes to such a substantial matter as compromise of an action, 'a person dealing with an attorney, as dealing with any agent, must ascertain whether the agent has authority to do the purported act and assumes the risk if in fact the agent has no such authority.' " *Id.* at 652. In view of this statement of California law, I find that Mr. Wartnick did not in fact have apparent authority to bind the claimant to a settlement of her civil case.

3. Ratification

Even if Mr. Wartnick lacked both the actual and apparent authority to settle the claimant's civil case against Waldron Duffy, a settlement entered into on the claimant's behalf could still be binding on the claimant if, following such an unauthorized settlement, the claimant ratified the settlement agreement. For example, an unauthorized settlement agreement could have been ratified if the claimant had signed a settlement release or accepted settlement funds after learning of the unauthorized settlement. However, there is no evidence that any such ratification occurred in this case. Nor, apparently, has the claimant ever said anything that in any way suggests that she approves of the settlement negotiated by Mr. Wartnick.

Nonetheless, the employer contends that the claimant has ratified the settlement "by silence" and by failing to take action to fire Mr. Wartnick. For two reasons, however, this contention is without merit. First, it has not been established that the claimant has in fact been fully informed about the unauthorized acts of Mr. Wartnick.[3] Although the claimant's deposition and written declaration establish that the claimant has not authorized Mr. Wartnick to settle her civil case, neither of these documents expressly indicates that the claimant is in fact aware of the fact that Mr. Wartnick has dismissed the claimant's action against Waldron Duffy or the fact that he had received $4500 for such dismissal. Likewise, even though Mr. Wartnick testified that some unnamed person in his office informed the claimant of "an offer" to settle her claim against Waldron Duffy for $4500, such testimony hardly establishes that the claimant was fully informed about all that Mr. Wartnick had done.[4] Accordingly, I conclude that the evidence fails to show that the claimant has been fully informed of the unauthorized

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[3] It is well established that without such a showing there can be no ratification of an agent's unauthorized acts. *Horner v. Ferron*, 362 F.2d 224, 231 n.10 (9th Cir. 1966).

[4] Indeed, it is questionable whether anyone from Mr. Wartnick's office actually did contact the claimant about the $4500 "offer" from Waldron Duffy. There are two reasons for such doubt. First, Mr. Wartnick was unable to say who in his office made such a contact or exactly when such a contact occurred. Second, the only settlement offer the claimant could recall during her deposition was an offer for $20,000 – an amount which was apparently offered to the claimant by the Longshore Act insurer to settle her Longshore Act claim. Tr. at 116.

actions of Mr. Wartnick. Absent such a showing, the claimant cannot be found to have ratified his actions.

Second, even if the claimant had been fully informed of Mr. Wartnick's unauthorized actions, her actions have not implied any type of silent ratification. Rather, the testimony of Mr. Wartnick and Mr. Jones indicates that the claimant refused to sign a release in favor of Waldron Duffy. Hence, to the extent that there is evidence on this issue, it indicates that the claimant rejected rather than ratified any settlement agreement with Waldron Duffy. Moreover, the employer's suggestion that the claimant's failure to fire Mr. Wartnick constitutes ratification of his actions is unpersuasive. There is no support for such a proposition in the case law and a rule requiring a client to fire an attorney in order to avoid ratification of unauthorized acts would in effect require an extreme response in situations where less drastic measures would be sufficient.

For the foregoing reasons, therefore, I find that the claimant is not bound by Mr. Wartnick's unauthorized efforts to settle the claimant's case against Waldron Duffy.

B. Execution of a Settlement Agreement

Since I have determined that the claimant is not bound under California law for Mr. Wartnick's unauthorized efforts to settle her case against Waldron Duffy, the claimant's rights to benefits under the Longshore Act are not barred under subsection 33(g) of the Act. Hence, it is unnecessary to decide whether the actions of Mr. Wartnick in fact constituted the execution of a settlement agreement within the scope of subsection

33(g). However, it is noted that in all probability the actions of Mr. Wartnick did in fact constitute the execution of a settlement agreement. Most significantly, in this regard, Mr. Wartnick consented to the dismissal of the claimant's civil action with prejudice and received settlement monies in return. It appears from the legal citations provided by the employer that these actions were by themselves sufficient to constitute the execution of a settlement agreement under California law, if Mr. Wartnick had in fact had the authority to enter into settlement agreements on the claimant's behalf.

Finally, it is noted that the employer has contended that because the dismissal of the claimant's action against Waldron Duffy was granted with prejudice more than six months before Mr. Wartnick and Mr. Jones agreed to vacate the dismissal, the dismissal is final under California law and cannot be set aside, even with the consent of the parties. This may be a correct interpretation of California law and as a result it may not be possible for the employer to ever obtain any type of recovery from Waldron Duffy. However, this does not mean that the claimant's Longshore Act claim is barred by the provisions of subsection 33(g). Subsection 33(g) applies only when a person entitled to compensation or that person's representative, either directly or through the *authorized* actions of an attorney, enters into an unapproved settlement. Since the actions of Mr. Wartnick in this case were not authorized by the claimant, subsection 33(g) is inapplicable even though the unauthorized actions of the claimant's attorney may have in fact prejudiced the employer's ability to obtain any recovery from Waldron Duffy. In

short, such actions may have constituted actionable negligence on the part of Mr. Wartnick, but they do not provide grounds for relief under subsection 33(g).

ORDER

1. The employer's motion for rescission of the aforementioned stipulations is denied.

2. Counsel for the claimant shall within 30 days of this order submit a fully supported application for costs and fees and serve a copy of such application on opposing counsel. Opposing counsel shall have 20 days from the date of service of such application in which to reply.

/s/ Paul A. Mapes
Paul A. Mapes
Administrative Law Judge

Date: OCT 18 1993
San Francisco, California

APPENDIX D

33 U.S.C. § 933

LONGSHORE AND HARBORWORKERS' COMPENSATION ACT

Sec. 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order

means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to –

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person.

Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of

the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

(h) Subrogation

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

APPENDIX E

Name, Address and Telephone No.) of Attorney(s) RODERICK D. JONES ESQ. ARCHER, MCCOMAS & LAGESON 2033 N. Main Street, Suite 800 Walnut Creek, CA 94596 (510) 930-6600 Attorney(s) for . . . Defendant(s) . .)	Space Below Illegible of Court Cost Only (Filed Sep. 11, 1992)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
(SUPERIOR, MUNICIPAL, or JUSTICE)

(Name of Municipal or Justice Court District or of branch court, if any)

Plaintiff(s): BEATRICE STADTMILLER Defendant(s): RAYBESTOS-MANHATTAN, INC., et al. (Abbreviated Title)	CASE NUMBER 692289-2 REQUEST FOR DISMISSAL TYPE OF ACTION [X] Personal Injury, Property Damage and Wrongful Death: [ ] Motor Vehicle [X] Other [ ] Domestic Relations [ ] Eminent Domain [X] Other: (Specify) Asbestos Exposure

TO THE CLERK: Please dismiss this action as follows: (Check applicable boxes.)

1. [xx] With prejudice [ ] Without prejudice

2. [ ] Entire action [xx] Complaint only
   [ ] Petition only [ ] Cross-complaint only
   [xx] Other: (Specify)

   * As to defendant Waldron, Duffy, INc. only. Each party to bear it's own costs.

Dated: 9/8/92
* If dismissal requested is of specified parties only, of specified causes of action only or of specified cross-complaints only, so state and identify the parties, causes of action or cross-complaints to be dismissed.

/s/ Illegible
Attorney(s) for
Plaintiff(s)

CARTWRIGHT, SLOBODIN, BOKELMAN, et al.
(Type or print attorney(s) name(s))

TO THE CLERK: Consent to the above dismissal is hereby given.**

DISMISSAL ENTERED SEP 11 1992

* * *

Victoria Edises, Esq.
Anne Landwehr, Esq. (C.S.B. #158302)
KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation
171 Twelfth Street, Third Floor
Oakland, California 94706
Telephone: (510) 465-7728

Attorneys for Claimant
BEATRICE STADTMILLER

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

BEATRICE STADTMILLER (widow of DELBERT STADTMILLER), Claimant, vs. MALLOTT & PETERSON, employer and INDUSTRIAL INDEMNITY, carrier, Defendant.	OALJ Case No. 92-LHC-2755 OWCP Case No. 18-87454 DECLARATION OF HARRY WARTNICK

I, Harry Wartnick, declare, the following:

1. I represent BEATRICE STADTMILLER in a civil lawsuit against the manufacturers and suppliers of asbestos products.

2. I have never had authority from Mrs. Stadtmiller to settle any part of her civil case.

3. Civil settlement papers have never been sent to BEATRICE STADTMILLER from my office, and Mrs. Stadtmiller has never signed any civil settlement papers.

4. My office has not entered into any civil settlements with any civil defendant on behalf of BEATRICE STADTMILLER.

5. My office has never forwarded any monies representing settlement of the civil case to BEATRICE STADTMILLER, and I have no knowledge of any civil settlement monies received by BEATRICE STADTMILLER.

6. Last year I negotiated a group of sixty (60) cases with civil defendant WALDRON DUFFY. They made offers to these plaintiffs which were subject to approval by my clients. The offer that WALDRON DUFFY made to Mrs. Stadtmiller has never been forwarded to her and has not been accepted by her. Similarly, I have not accepted the proposed settlement with WALDRON DUFFY on behalf of BEATRICE STADTMILLER. I have not been authorized to accept such a settlement by Mrs. Stadtmiller. I have not even presented the proposed settlement to Mrs. Stadtmiller.

7. After negotiating these cases with WALDRON DUFFY, defendant WALDRON DUFFY or its insurance carrier chose to send me a check for the entire amount of the sixty (60) offers rather than sending sixty (60) separate checks after settlement papers were returned. That portion of the WALDRON DUFFY check representing the Stadtmiller offer remains in our Trust Account.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 19, 1993, at San Francisco, California.

/s/ Illegible

MESSRS. LAUGHLIN, FALBO, LEVY & MORESI

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

BEATRICE STADTMILLER, Claimant, vs. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Carrier.	OALJ Case No. 92-LHC-2755 OWCP Case No. 13-87454

DEPOSITION OF BEATRICE STADTMILLER
TUESDAY, MAY 25, 1993

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* * *

[p. 19] Mr. Wartnick did you ever discuss settlement or authorization of settlement of your claim with him?

A. No.

Q. Other than the conversation that you had on the phone that we have previously discussed, did you ever instruct anyone from the Cartwright office not to settle any portion of your claim, your civil claim?

A. I had no reason to talk about it.

Q. But do you ever recall instructing anyone from the Cartwright office not to settle a portion of your claim?

A. Neither way. Didn't do either.

Q. So you didn't instruct them to settle or not to settle?

A. Right.

MS. EDISES: Well, that is confusing. You said, "Other than the conversation –" You mean other than that one conversation where she rejected the offer? She hasn't given such-and-such instruction? Is that what you meant?

MR. POPPY: Right.

MS. EDISES: Okay.

MR. POPPY: Q. What is the current status of that civil claim?

A. I have no idea.

Q. Are you aware of any activity in that claim

* * *

M 221-6384

HANOVER INSURANCE

MASSACHUSETTS BAY INSURANCE CO
EXECUTIVE OFFICE: WORCESTER, MASSACHUSETTS 01605

CHECK NO. 00419105 51-44/119
00419105

TO ORDER OF
CARTWRIGHT, SLOBODIN, ET AL
IN TRUST FOR VARIOUS ASBESTOS PLAINTIFFS
P O BOX 8035
WALNUT CREEK CA 94596-3728

VOID AFTER 6 MONTHS

PAY $ **60,250.00

FOR FULL & FINAL SETTLEMENT OF
59 ASBESTOS BI CLAIMS

SURED / AIMANT	DATE OF LOSS	ADJ. OFF.	POLICY NUMBER	FEA.	DATE ISSUED
BASCO INC. / DAVID ACKERMAN	01/01/87	47	QDM 0907429	01	08/21/92

AIM NO. 470513100100

ISSUED AT SACRAMENTO, CA

SIGNATURE [signature] NOT NEGOTIABLE
BILL MAKIMOTO

NNECTICUT NATIONAL BANK

DETACH BEFORE DEPOSITING

TEM

MCDERMOTT-COSTA CO INC
276 DOLORES AVENUE
P.O. BOX 758
SAN LEANDRO, CA 94577

THE ADJUSTER HANDLING
THIS CLAIM IS
TAMARA K. BELEW

88

ARCHER, MCCOMAS & LAGESON
P O BOX 8035
WALNUT CREEK CA 94596-3728

ADJ. NO.	SIGNER	ISS. OFF
076	12	47

ATTACHED CHECK IS IN PAYMENT OF LOSS EXPENSE SHOWN ABOVE FIELD CLAIM OFFICE

000099

App. 64

BEST AVAILABLE COPY

16761030

TRIPLICATE

16761030

☐ THE OHIO CASUALTY INSURANCE CO. ☐ AMERICAN FIRE AND CASUALTY CO. AUGUST 14, 19 92

☒ WEST AMERICAN INSURANCE CO. ☐ OHIO SECURITY INSURANCE CO. ☐ THE OHIO LIFE INSURANCE CO.

$120,500.00

Pay ONE HUNDRED TWENTY THOUSAND FIVE HUNDRED AND 00/100 ---------- DOLLARS

to the order of Cartwright, Slobodin, et al in trust for various asbestos plaintiffs

Policy No. XLW 176941 Loss Date 8/31/83 19

Claim No. OAK 1 GL 87-62 92 12 W

For: SETTLEMENT OF ALL CLAIMS AGAINST WALDRON AND DUFFY, INC.

Tax I.D. No. M.P. ☐ 1 ☐ 2

Insured: Waldron and Duffy, Inc.

BODILY INJURY			2	3	5
PROPERTY DAMAGE				4	
MEDICAL PAYMENT			6-APPR.	8-ADJ.	9-LEGAL
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[redacted] Col	120,500.00				
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August 4, 1992

Mr. Ray Horton
Claims Manager
The Ohio Casualty Group
P. O. Box 5126
Concord, CA 94524

Ms. Tamara Belew
Claims Representative
Hanover Insurance Co.
P. O. Box 15380
Sacramento, CA 95851

Re: Insured : Waldron, Duffy, Inc.

Dear Mr. Horton and Ms. Belew:

We are pleased to inform you that we have settled 60 of the Waldron, Duffy Cartwright cases as per the enclosed settlement list. The total amount for the 60 cases is $180,750. The one-third split to Hanover and two-thirds split to Ohio works out to $60,250 for Hanover and $120,500 for Ohio. Please send us your check/draft which

we will exchange for the properly executed Releases and/or dismissals.

As you will recall, this particular group of Waldron, Duffy cases contained an abnormally large number of cases where the plaintiffs had serious disease including lung cancer or mesothelioma. As a result, we had requested up to $10,000 authority on those cases and you will note that only the Salsman case settled for the full authority. The average for the more serious cases was $8,066.66. The average for the remaining cases worked out to be $1,389.53.

We have recently received 23 new Cartwright cases against Waldron, Duffy and we will be reporting to you on those as soon as we have some information.

If you should have any questions, please don't hesitate to contact me.

Very truly yours,

ARCHER, McCOMAS & LAGESON

/s/ Rod Jones
Roderick D. Jones

RDJ/bd
Attachment

SUPREME COURT, U.S.
FILED
MAR 24 1997
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(2)

No. 96-1163

In The

Supreme Court of the United States

October Term, 1996

MALLOTT & PETERSON and
INDUSTRIAL INDEMNITY COMPANY,

Petitioners,

v.

BEATRICE STADTMILLER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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108 pp

QUESTIONS PRESENTED

1. Whether an attorney is the "representative" entitled to compensation as referred to in 33 U.S.C. section 933(g).

2. Whether a client is bound by her attorney's actions in the absence of her express or implied authorization or ratification.

PARTIES TO THE ACTION

Defendants/Petitioners:	*Mallott & Peterson, Employer; and, Industrial Indemnity, Insurer*
Plaintiff/Respondent:	*Beatrice Stadtmiller, Widow of Delbert Stadtmiller*
Federal Respondent:	*Director, Office of Workers' Compensation Programs, United States Department of Labor*

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

The Opinion of the Court of Appeal (Pet. App. A:1-11) is reported at 98 F.3d 1170. The Decision and Order of the Benefits Review Board (Pet. App. B:12-31) is reported at 28 Ben.Rev.Bd.Serv.(MB) 304. The Decisions and Orders of the Administrative Law Judge (Pet. App. C:32-52; Resp. App. A:1-9) are unreported.

II. JURISDICTION

The Court of Appeal entered its judgment on October 24, 1996. There were no Petitions for Rehearing. The Petition for a Writ of Certiorari was filed on January 22, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

III. STATEMENT OF THE CASE

The Longshore and Harbor Workers' Compensation Act (hereafter "LHWCA" or "the Act"), 33 U.S.C. section 901, *et seq.*, provides benefits to injured longshore employees and their dependent families. Those benefits may be terminated if the employee or dependent (hereinafter "claimant") settles a civil lawsuit for the same injury with third parties without the employer's consent.[1]

---

[1] 33 U.S.C. section 933(g)(1) provides in pertinent part:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person . . . for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter,

Mallott & Peterson, employer herein, contends claimant Beatrice Stadtmiller's attorney entered into an unauthorized third party settlement even though both the client and her attorney denied the attorney possessed any authority to settle, nor actually settled the case. The attorney simply agreed to the value of the case and indicated he would recommend a settlement offer to the client, the client rejected the offer, did not sign any settlement releases, and did not receive any settlement monies. The courts below found this conduct did not constitute a settlement binding on the client, nor did it violate any statute. Yet employer attempts to portray a settlement based on incomplete facts in order to prematurely and unfairly trigger the forfeiture provisions of 33 U.S.C. § 933(g). After reviewing *all* the material facts, this Court should conclude the court below clearly did not err and should deny the Petition for Writ of Certiorari.

Employer Mallott & Peterson exposed employee Delbert Stadtmiller to asbestos during his 1940 to 1946 employment. In 1990 the employee developed lung cancer, secondary to asbestos exposure, from which he died on December 21, 1990. His widow, Beatrice Stadtmiller, thereafter sought LHWCA death benefits from Mallott & Peterson and its insurer Industrial Indemnity.[2] In February 1993, the parties resolved all pending issues by stipulation. One month later, employer moved to rescind the

---

> the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer or the employer's carrier, before the settlement is executed. . . .

[2] Employer and carrier will hereinafter be referred to as "employer."

stipulations, and claimed an unauthorized civil settlement agreement with civil defendant Waldron Duffy by Mrs. Stadtmiller's attorney required termination of benefits, and summary judgment pursuant to 33 U.S.C. § 933(g). (Pet. App. A:33.)

Administrative Law Judge (hereinafter ALJ) Paul Mapes presided over the June 22, 1993 hearing, at which time the following facts were ascertained. In the spring of 1992, attorney Harry Wartnick of the Cartwright law office commenced representation of Beatrice Stadtmiller in a civil action filed against asbestos manufacturers and suppliers as a result of her husband's asbestos-related injury and death, upon referral from the law firm of Kazan, McClain, Edises & Simon, LHWCA counsel for Mrs. Stadtmiller. (Resp. App. E:25-26.) On April 16, 1992, and again on June 9, 1992, Mrs. Stadtmiller's longshore attorney advised Mr. Wartnick of the pending LHWCA action, and instructed Mr. Wartnick that the widow could not accept any civil settlements without the consent of the longshore carrier. (Resp. App. B:10-12.)

By deposition and declaration, Mrs. Stadtmiller confirmed Mr. Wartnick's representation, and unequivocally stated that "I have not authorized my attorneys to settle my civil lawsuit against any asbestos manufacturer in the absence of obtaining consent from Industrial Indemnity." (Resp. App. D:19, 21-22.) She knew that the LHWCA counsel had instructed Mr. Wartnick to not enter into any settlement without the consent of Industrial Indemnity. (*Id.* at p.19.) The widow denied receiving any civil settlement monies, nor providing authorization to dismiss any civil defendants. (*Id.* at p.17, 21.)

Attorney Wartnick testified at the June 22, 1993 hearing. He stated he never obtained authorization from Mrs.

Stadtmiller tc settle any part of her civil case. (Resp. App. E:26-27.) Addressing the claimed settlement agreement, Mr. Wartnick explained that in 1992 he entered into settlement negotiations with Roderick Jones, counsel for civil defendant Waldron Duffy, concerning a group of 60 cases, which included the Stadtmiller case. (*Id.* at p.54.) Mr. Jones communicated offers to settle the group of cases to Mr. Wartnick, who agreed to recommend the offers to his clients, stating "anything we did would have to be on a recommend basis." (*Id.*) Mr. Wartnick indicated that his office would prepare settlement papers and defendants could forward one check representing the settlement monies for the group of cases to Mr. Wartnick's office to hold in a trust account until the settlement releases had been signed and forwarded to defense counsel. (*Id.* at pp.54-55.) Mr. Wartnick agreed to sign requests for dismissals so that the civil defendant would not have to actively involve itself in the continuing civil litigation, "with the understanding that if the client rejected the offer, at that point, it would re-enter the litigation and would effectively be bound by whatever occurred in the interim." (*Id.* at p.55.) The monies were sent to Mr. Wartnick's office and deposited in his firm's trust account. (*Id.* at p.43.) Mr. Wartnick mistakenly signed a dismissal in the Stadtmiller case for Waldron Duffy with prejudice, rather than without prejudice, which was filed in Alameda County Superior Court. (*Id.* at p.39-40.)

The Waldron Duffy offer to Mrs. Stadtmiller amounted to $4,500.00. Attorney Wartnick never accepted the Waldron Duffy offer. (*Id.* at p.29.) Rather, his office communicated the $4,500.00 offer to Mrs. Stadtmiller, who rejected it. (*Id.* at p.55-56.) When Mrs. Stadtmiller rejected the offer, Wartnick advised Mr. Jones, who

agreed to vacate the request for dismissal and re-enter the litigation. (*Id.* at p.56.) *Settlement releases were never prepared in the Stadtmiller civil case. (Id. at p.57.) Funds delivered to Mr. Wartnick's office representing the Waldron Duffy settlement offer to Mrs. Stadtmiller were returned to counsel for Waldron Duffy. (Id. at p.49.) The civil settlement monies were never received by the widow. (Id. at p.28.) Finally, Superior Court Judge Ken Kawaichi approved the stipulated vacation of Waldron Duffy's filed dismissal. (Id. at p.51.)*

By deposition, defense counsel Roderick Jones confirmed that the agreement he had with Mr. Wartnick and the payment of money were contingent upon his receiving signed releases from Beatrice Stadtmiller. (Resp. App. F:69.) He never received releases signed by Beatrice Stadtmiller (*Id.* at p.64). He did not consider the Stadtmiller civil case to be settled. (*Id.* at p.70.) Mr. Jones also testified to his understanding that in California settlements were not enforceable absent a written agreement (*Id.* at p.68.) Finally, he confirmed that the monies were returned to his office, and he stipulated to a vacation of the filed dismissal. (*Id.* at p.65.)

In light of the above evidence, ALJ Mapes denied the motion for rescission of stipulations on October 18, 1993, finding widow Stadtmiller did not settle her civil case against civil defendant Waldron Duffy, nor was she bound by any actions of her attorney, applying California law to determine if Attorney Wartnick had actual or apparent authority to settle. (Pet. App. A.) Employer moved for reconsideration, claiming Mr. Wartnick constituted the widow's "representative" for purposes of section 33(g), and that claimant ratified the attorney's actions by her own inaction. ALJ Mapes considered and denied employer's motion. (Resp. App. A.)

Upon review, the Benefits Review Board affirmed ALJ's findings in all respects, and in addition found that based on the facts presented there was no settlement as a matter of law. (Pet. App. B.)

Employer again appealed, to the Ninth Circuit Court of Appeals, which affirmed the Board's decision in all respects. With regard to employer's argument that attorney Wartnick should be considered the widow's representative, the court said:

> [W]e hold that the Director's interpretation of 'representative' in § 933(g) to mean the 'legal representative of the deceased,' and to exclude legal counsel acting within the attorney-client relationship, is reasonable. Section 933(c) specifically defines the term 'representative' for purposes of § 933. Section 933(c) provides that 'legal representative of the deceased' is hereinafter referred to as 'representative.' 33 U.S.C. § 933(c); *see also Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 539 (1932) (interpreting 'representative' in § 933(e) to mean 'representative of the deceased'). Moreover, only the Director's interpretation of 'representative' can be reconciled with the specific language of § 933(g)(1). Section 933(g)(1) refers to entering into settlements 'for an amount less than the compensation to which the person (or the person's representative) would be entitled. . . . ' As the Board pointed out, '[w]hile a legal representative of the decedent may receive compensation [for LHWCA claim], his attorney cannot.' *Stadtmiller*, 1994 WL 661134, at *5. Attorneys can recover attorney's fees, but they are not entitled to recover 'compensation,' defined in § 902(12) of the Act as 'the money allowance payable to an employee or his dependents. . . . ' " 33 U.S.C. § 902(12).

(Pet. App. A:6-7.)

The Court similarly rejected employer's claim that Mrs. Stadtmiller ratified her attorney's negotiations:

> The Board determined that the ALJ's finding that Stadtmiller had not ratified Wartnick's efforts was rational, given the evidence in the record. Ratification requires that the principal, knowing the facts, accepts the benefits of the agent's actions. *See Alvarado Community Hosp. v. Superior Court*, 219 Cal.Rptr. 52, 54-55 (1985). We agree with the Board that the ALJ's finding of no ratification was supported by substantial evidence in the form of testimony by Wartnick and Waldron's attorney that Stadtmiller refused to sign a release in favor of Waldron. Neither Stadtmiller's deposition nor her written declaration required the ALJ to infer that she was aware that Wartnick had dismissed her action against Waldron or that he had received a payment earmarked for her as a result of the dismissal. We join the Board in accepting the ALJ's reasoning that, even if Stadtmiller had known the details of Wartnick's conduct, it is doubtful that she would have realized this conduct amounted to a settlement or have understood enough about the legal consequences of a settlement to have knowingly ratified it. In sum, the Board properly applied to substantial evidence standard when it affirmed the ALJ's finding that Stadtmiller rejected rather than ratified any settlement agreement.

(Pet. App. A:10.)

IV. ARGUMENT

A. The Court's Statutory Interpretation Preserves, And Does Not Impair, Employer's Statutory Rights

Correct statutory construction of section 33(g) of the Act is at issue here. Competing interpretations are presented; one which unfairly benefits employer and needlessly harms injured workers and their families, versus one which protects the interests of both employers and longshore claimants. Resolution of this issue is controlled by this Court's mandate to liberally construe the LHWCA in favor of injured workers' recovery to further the Act's "humanitarian purpose," and to avoid "harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *accord Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 315-316 (1983).

Courts consistently acknowledge and abide by these precepts, following the LHWCA's "overall humanitarian policy" by requiring that "all doubtful questions of fact be resolved in favor of the injured employee." *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Force v. Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991). Examples of strict compliance with these edicts range from finding injury occurred in the course of employment, recognizing that "the Act must be construed liberally in favor of coverage to effectuate its broad, remedial purpose" *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1104 (9th Cir. 1982), to determining the identity of the single reliable employer where two contemporaneous employments might have caused the injury by deciding:

> When the evidence does not clearly indicate which of the covered employers who exposed

> him to injury the employee *last* worked for, *the purposes of the LHWCA are best served by assigning liability to the employer who is claimed against. Placing the burden of proof on an employer who has exposed the claimant to harm ensures that the claimant will recover for his injuries.*

General Ship Service v. Director, OWCP, 938 F.2d 960, 962 (9th Cir. 1991).

Interpretation of section 33(g) requires no less stringent adherence to the LHWCA's laudatory purposes. The Ninth Circuit's *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (1990) decision underscores the importance of considering the Act's "humanitarian purpose" in this area. Bethlehem Steel contended Mobley lost his rights to medical benefits by failing to *immediately* notify employer of a civil settlement. The *Mobley* court rejected this proposed section 33(g)(2) interpretation, following instead the Board's position that as long as the employer is afforded notice prior to making payments or the issuance of an award, the employer's lien and credit rights are sufficiently preserved. The court's conclusions are especially pertinent here:

> *Bethlehem's interpretation appears to serve no statutory purpose. The Board's interpretation, on the other hand, protects the interests of both the employer and the employee, thereby striking the delicate balance which the LHWCA strives to achieve. Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636, 103 S.Ct. 2045, 2052, 76 L.Ed 194 (1983). The Supreme Court has observed that the LHWCA is a humanitarian act and "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." (Citations).

Bethlehem Steel Corp. v. Mobley, supra, 920 F.2d 558, 561-562.

Force v. Director, OWCP, 938 F.2d 981 (9th Cir. 1991) also heeded the beneficial purposes of the LHWCA by compelling employers to bear the burden of proving a section 33(g) offset for civil settlements involving multiple parties. Holding that employers are only allowed credit for those portions of a third party settlement attributable to the longshore claimant, the court refused the suggestion that the widow bear the burden of apportionment, finding "this contravenes our case law and the purposes of LHWCA." *Id.* at p. 985. Citing the Act's "overall humanitarian policy," the court instead looked to the employer, explaining:

> Placing the burden of proof on employers is particularly appropriate in the context of Section 933(f) because the employer remains liable for the full amount of the statutory compensation absent a showing that the claimant has been compensated by a third party. *To ensure that the claimant receives his due, the employer must carry the burden of proving what is the claimant's portion of the group settlement.* Until the employer makes this showing, it is not entitled to an offset.

Id. at p. 985.

As seen in *Bethlehem Steel Corp.* and *Force,* protection of employers' section 33(g) rights can be preserved without harshly affecting the Act's mission to ensure needed compensation to longshore employees and their families. As often cited, section 33(g) "protects the employer against his employee accepting too little for his cause of action against a third party." *Banks v. Chicago Grain Trimmers,* 390 U.S. 459, 467 (1968). Yet that protection is not needed when the danger does not exist. The *Banks* court

agreed, refusing to interpret acceptance of a remitter as an unapproved settlement because the danger of the employee accepting too little was "not present when damages are determined, not by negotiations between the employee and the third party, but rather by the independent evaluation of a trial judge." *Id.* at p. 467, citing *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960). The *Bell* court also rejected acceptance of a remitter as a compromise for section 33(g) purposes, remarking that the contrary interpretation is "unnecessarily harsh, and is not within the requirement of the Act's language, or its spirit and purpose." *Id.* at p. 781. The court reiterated the by now well worn principles that:

> *In the absence of language demanding it, a construction is not to be favored which visits a forfeiture on the employee or his dependent and gives a windfall to the insurance carrier.* "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953), 74 S.Ct. 88, 92, 98 L.Ed. 5.

Bell v. O'Hearne, supra, 284 F.2d 777, 781.

Yet employer zealously seeks that forbidden windfall in this case, claiming an unauthorized civil settlement terminates the widow's benefits, *in the absence of* her acceptance of a settlement offer, settlement releases signed by claimant, or claimant's receipt of civil settlement monies. Mrs. Stadtmiller did not settle her civil case, did not give her attorney authorization to settle, and knew her LHWCA counsel instructed the civil counsel to *not* settle her case. Both the civil counsel and the civil defendant's counsel deny the case is settled, and confirm the civil defendant is still in the case. Employer has not been prejudiced and indeed retains all its rights. The

courts below did not err in refusing to unfairly and unnecessarily deprive an innocent widow of longshore benefits, provide an unconscionable windfall to the employer, and violate the "overall humanitarian policy" of the Act itself.

B. The Widow's Attorney Is Not Her "Representative" For Purposes of 33 U.S.C. Section 933(g)

This Court's *Cowart v. Nicklos Drilling*, 112 S.Ct. 2589 (1992) decision emphasized the first rule of statutory construction:

> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.

Id. at 112 S.Ct. 2594.[3] Section 33 includes precisely such clarity when read as the integrated statutory scheme Congress intended rather than as isolated subdivisions. The statute addresses the *rights* of injured workers, their dependents, their "representative," and their employers, when third parties are sued on account of the injury. To avoid uncertainty, Congress confined the rights of the "representative" to the right of the "legal representative of the deceased," section 33(c). Yet employer would have this Court ignore Congress' clearly expressed intent, and

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[3] See, also, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) wherein the Supreme Court held that where "the statute is clear and ambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress'. . . . ", and *Ingalls Shipbuilding, Inc. v. Director, OWCP* (1997) 97 C.D.O.S. 1077.

deem an attorney to be the person's "representative," expanding the term beyond its already provided definition, and desecrating the very purpose of the statute, which allots *rights to recovery*, of which an attorney has none. Examination of section 33 reveals these very basic flaws in employer's argument.

In its entirety, section 33 is an inextricably intertwined, remedial scheme designed to protect injured workers' rights to compensation and, on balance, to protect complying employers' rights to subrogation from third party tortfeasors. When read as an integrated whole, the statute outlines Congress' purpose. Subdivision 33(a) explains that the "person entitled to compensation," be it the injured worker or his dependents (i.e., the "claimant"), *need not elect* between LHWCA benefits and civil damages against a third party tortfeasor, but may seek both. Thus Congress encouraged third parties to provide a safe work place by permitting injured workers and their families to bring tort actions.

Subdivision 33(b) assigns the claimant's *right* to sue the third party tortfeasor to the employer, unless the injured worker (or dependent) sues the third party within six months of "*acceptance of compensation* under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board." Congress' automatic assignment of claimant's right to sue a responsible third party, to the employer who paid the compensation the claimant accepted, is plainly designed to insure that the claimant does not deprive the employer of his right to subrogation from the wrongdoer by failing to pursue a tort action. It gives the employer 90 days to initiate an action against the third party before the right to sue reverts back to the claimant.

Covering all circumstances, Congress' logical outline continues as section 33(c) provides that an employer's payment into the section 944 fund (or Special Fund), when "there is no person *entitled under this chapter to compensation for the death of an employee* which would otherwise be compensable" (section 944(c)), operates "as an assignment to the employer of all *right* of the legal representative of the deceased (*hereinafter referred to as the "representative"*) to recover damages against such third person. Thus Congress intended to assign to the employer not only the *rights* of the person presently "entitled to compensation" but the *right* of the deceased employee's survivors to unpaid compensation awarded to the employee prior to his death.[4]

Next, section 33(d) provides that the employer may sue or settle with the third party after such assignment. Section 33(e) divides the proceeds of an employer's successful exercise of the section 33(b) or (c) automatic assignment of the right to sue the third party, *and includes a share "to the person entitled to compensation or to the representative"* if there is money left over after the employer gets its share.

Section 33(f) relates back to the section 33(b) provision that assigns the tort action to the employer if the claimant accepts LHWCA compensation and fails to sue within 90 days, then returns the right to sue to the worker if the employer does not exercise this right to sue within 90 days. Thus, section 33(f) describes the process where a *"person entitled to compensation"* initiates proceedings

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[4] See section 903(d) of the Act which provides unpaid disability benefits shall be paid to the deceased employee's survivors.

against the third party. The employer remains liable for the difference between the claimant's benefit entitlement and the tort recovery, after reasonable attorneys' fees for the party who brought the tort case.

Section 33(g) provides further detail on the situation where the "person entitled to compensation" or the "representative," rather than the employer, brings a tort action. This provision protects the employer from the possibility that the claimant or "representative" might settle the third party action for less than the compensation the "person entitled to compensation" or *"representative"* may *"be entitled to* under this chapter," thereby depriving employer of its subrogation rights, by terminating "all *rights* to compensation and medical benefits" if such a settlement is executed by the "person entitled to compensation" or "representative."

Section 33(h) carries Congress' outline a practical step further. An employer's *insurer* stands in the employer's shoes with respect to subrogation rights and the automatic assignment of the right to use the third party.

Section 33(i) completes Congress' outline with its provision that there is no right to elect a tort action against the third party who caused the worker's injury if that third party is an officer or employee of the injured worker's employer.

Consideration of section 33 in its entirety thus leads to the inescapable conclusion that Congress could not, and did not, intend to include attorneys in the class of "representative." Section 33 apportions the *rights to recovery* to either civil or LHWCA compensation between the entities *entitled* to such compensation, be it the employer,

the injured employee, his dependents or the "legal representative of the deceased" if the employee dies without leaving persons entitled to compensation for his death. This Court recently affirmed this interpretation of section 33 in *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra,* 97 C.D.O.S. 1077. There, section 33(g)'s reference to "person entitled to compensation" did not include spouses of employees because the plain language of the statute applied only to persons *presently* entitled to compensation.

Attorneys, of course, do not possess any *rights* to LHWCA compensation.[5] Yet employer's interpretation of section 33(g) would confer on an attorney *rights* to compensation which the statute expressly forbids. If followed, section 33(g)(1) would state that if a civil settlement is entered into "for an amount less than the compensation to which the person (or the person's attorney) would be entitled under this chapter" the employer's liability for benefits absent written approval is terminated. On the other hand, if the term "representative" is defined *as required* by section 33(c) to mean the "legal representative of the deceased," the statute would provide that if a civil settlement is entered into "for an amount less than the compensation to which the person (or the legal representative of the deceased) would be entitled under this chapter," absent employer approval, the right to compensation is barred. This reading is completely consistent with the purpose and the function of

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[5] See section 914(a) which provides compensation must be paid directly to the person entitled thereto, and section 928(c) which requires attorneys' fees to be either paid by the employer/carrier, or be allowed as a lien upon compensation on an award, and in all cases must be approved before collection.

this section in allocating rights to compensation, does not violate statutory prohibition against attorney receipt of compensation, and provides the most logical interpretation of the contested term.

Basic rules of statutory construction also demand rejection of employer's argument. When a statute is clear and ambiguous, its plain language must be followed. *Federal Land Bank of New Orleans, L.A. v. Sear*, 109 F.2d 419 (5th Cir. 1940). So too, a statute must not be interpreted to render a portion of the statute meaningless or without effect. *Mountain States Tel. & Tel. Company v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Discarding section 33(c)'s express definition of the term 'representative' for later use in section 33(g) renders that language meaningless, and ignores the plain and precise language of the Act.

The *Aetna Life Insurance Company v. Moses*, 287 U.S. 530 (1932) decision provides guidance to the issue at hand. There, the deceased employee's widow, also the administratrix, accepted an LHWCA award of compensation, thus electing against a wrongful death action pursuant to then section 33(a) (which required an election by the person entitled to compensation to either receive compensation *or* recover damages against such third person).[6] That acceptance assigned to the employer the person's right to recover damages against a third person. The LHWCA insurer, payor of the benefits, thereafter brought suit as plaintiff in its own right, in the name of the widow "in her own right and as administratrix" and in the name of the employer. The court ruled the insurer

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[6] Section 33(a) was amended in 1959 by deleting the required election of remedies.

could pursue a third party action in this manner, notwithstanding the District of Columbia's death act which designated the administratrix as the only proper plaintiff in an action for wrongful death, an action not assignable at common law. The court recognized the LHWCA authorizes the employer to institute such a civil suit, stating that "any recovery in excess of the sums required to reimburse the employer and allow for compensation payable by him is to be paid to the representative of the deceased," citing section 33(e). *Aetna Life Ins. Co., supra,* 287 U.S. 530, 539. Importantly, section 33(e) does not explicitly state the excess will be paid to the "representative of the deceased", rather it only refers to the "person entitled to compensation or to the representative." Thus this Court has already implicitly followed section 33(c)'s directive to consider the term "representative" to "hereafter" mean "representative of the deceased", concluding the employer could enforce rights already vested in the employee or his personal representative, and emphasizing that "what is material is that the employer acquires the *legal rights* of the employee or the personal representative." *Aetna Life Ins. Co., supra,* 287 U.S. 530, 541 (emphasis added).

Employer's other arguments are similarly unpersuasive. Employer contends the Ninth Circuit's interpretation would exclude minors and incompetents because they would not be included in the definition of the term "representative" provided in section 33(c). Once again, the answer lies in the context of section 33 of a whole. Section 33 was intended to cover the rights of "persons entitled to compensation" and if there are no dependents of the deceased employee, that is no "person entitled to

compensation," to also cover the rights of the legal representative of the deceased. The term "person entitled to compensation" as used in section 33 necessarily includes all living dependents whether they are the employee, the dependent, or a minor or incompetent.

Whether the Act referred to attorneys as representatives in other sections is also irrelevant to interpretation of subsection 33(g) when Congress has specifically defined the term "representative" in that section. Congress directed the terms contained within section 33 to bear a particular meaning; that intent should be obeyed. The meaning of a particular word:

> may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances on which the language was employed. . . . ¶ It is not usual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance.

Atlantic Cleaners & Dyers, Inc. v. United States, 289 U.S. 427, 433 (1932).

Perhaps cognizant of its distorted reading of section 33(c), employer also attempts to argue that the term "legal representative" includes an attorney, citing *Graves v. United States Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982). The *Graves'* court allowed an attorney for a quadriplegic to sign a claim form filed pursuant to the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671-80 on the plaintiff's behalf as his legal representative. The court looked to the language of the regulation itself to infer the

drafters intended to allow an attorney to sign as legal representative for the plaintiff. In stark contrast, the language of section 33(g) dissuades inclusion of attorneys as legal representatives. Section 33(g) does not deal with the mere signing of a claim form, but addresses the *substantive rights* of longshore claimants, more akin to the rights of a party addressed by Federal Rule of Civil Procedure 60(b). Rule 60(b) allows the court to "relieve a party or his legal representative from a final judgment, order, or proceeding. . . . Because Rule 60(b) affects the *substantive rights* of a party, courts have not allowed non-parties such as attorneys to benefit from the rule's lenient provisions. The *Mobay Chemical Company v. Hudson Foam Plastics Corp.*, 277 F.Supp. 413 (1967) court rebuffed an attorney's attempt to move for relief from orders of injunction, claiming that he was "a legal representative." The court concluded:

> The phrase "legal representative" as used in Rule 60(b) does not include legal counsel within the context of the attorney-client relationship, and, therefore, cannot provide a basis of standing for movant. A "legal representative" is one "who stands in the place and instead of" another, such as a heir at law. . . .

Mobay Chemical Company, supra, 227 F.Supp. 413, 416.

Following the district court's lead the circuit courts agreed, also finding the "legal representative" referred to in Rule 60(b) did not encompass attorneys, see *Western Steel Erection Company v. United States,* 424 F.2d 737 (10th Cir. 1970) and *Kem Mfg. Corp. v. Wilder,* 817 F.2d 1517 (11th Cir. 1987). The *Kem Mfg. Corp.* analysis is most fitting here:

> The cases make clear that the term legal representative was intended to reach only those individuals who were in a position tantamount to that of a party or whose legal rights were otherwise so intimately bound up with the parties that their rights were directly affected by the final judgment.

Id. at page 1520.

An attorney does not stand in the place of a party, but merely argues the party's cause. Only a legal representative in Rule 60(b) can be relieved from the effects of a judgment; an attorney cannot be because he is not affected by a judgment. Similarly, the representative in section 33(g) is referred to as a person entitled to compensation; again, a claimant is entitled to compensation but not his attorney. Because the statute deals with the rights of the longshore claimants, as does Rule 60(b), attorneys (without such rights) are necessarily excluded, see *Mobay, Kem Mfg. Corp.*

Finally, employer resorts to the purposes of section 33(g) in an attempt to bolster its position. Yet protection of employer's rights does not compel the distorted reading employer asserts. Employer's rights are not jeopardized if section 33(g) is limited to the actions of claimants and/or representatives of the estates of deceased claimants. Attorneys cannot settle a case without some action by their client, the receipt of monies, the execution of settlement documents, the granting of authority to settle a case, see *Blanton v. Womancare, Inc.*, 38 Cal.3d 396 (1958); *Chavez v. Director, OWCP*, 961 F.2d 1409 (9th Cir. 1992). Direct action required by the claimant is proper where settlement of the civil suit can bar the claimant's rights to compensation. The claimant is at risk, not his or her attorney.

The most egregious error employer commits is its claim of prejudice. As the courts below found, no settlement took place and employer has not suffered any prejudice. Mrs. Stadtmiller did not receive any civil monies, and when advised of the settlement offer refused it. Employer cannot claim credit pursuant to section 33(f) of the net amount recovered by the widow in the *absence of any recovery at all.* Employer's rights therefore remain inviolate. Mrs. Stadtmiller neither recovered too little nor too much; she has not recovered any amount at all. Employer can still withhold consent, and if an unauthorized settlement ultimately takes place, its liability is extinguished. Because no settlement occurred no prejudice has inured to employer, and its construction of the statute would merely benefit itself and unfairly prejudice the widow. When faced with two competing interpretations of section 33(g), this Court should affirm the interpretation which protects the interests of *both* the employer and the employee, "striking the delicate balance which the LHWCA strives to achieve". *Mobley, supra,* 920 F.2d 558, 561.

C. The Widow Is Not Bound By Unauthorized Conduct Of Her Attorney

Neither Mrs. Stadtmiller nor her attorney "settled" her civil case in violation of section 33(g). She withheld specific authorization to settle her case from attorney Wartnick; rejected an offer by the civil defendant; and did not receive civil settlement monies. (Resp. App. D:17, 19, 21-22; E:55-56.) Mr. Wartnick negotiated an anticipated settlement with civil defendant Waldron Duffy, agreed to recommend a civil settlement offer from Waldron Duffy to claimant and agreed to dismiss Waldron Duffy from

the civil action if claimant Stadtmiller accepted the civil offer. (Resp. App. E:54-56.) While Mr. Wartnick mistakenly allowed a dismissal with prejudice to be filed, and held monies representing the offer in trust while waiting acceptance or rejection from Mrs. Stadtmiller, upon rejection of the offer he returned the monies to defendant Waldron Duffy, and obtained a vacation of the dismissal as per his agreement with counsel for Waldron Duffy. (Resp. App. E:56.) The actions by attorney Wartnick clearly did not constitute settlement of the civil action. However, whatever actions attorney Wartnick did or did not take, and the legal ramifications resulting therefrom, are not binding upon Mrs. Stadtmiller.

Resolution of whether a client is bound by her attorney's actions is resolved by principles of agency law governing attorney-client relationships. But which law to apply, state or federal? The trial court concluded that California law should apply, explaining that:

> When it is recognized that the primary purpose of subsection 33(g) is to preclude claimants from entering into settlement agreements with third-party tortfeasors that might adversely affect the interest of employers and their insurers, it is (sic) becomes clear that the appropriate standard under section 33 for determining when a claimant should be bound by the settlement-related actions of the claimant's attorney is the standard that would be applied by the court having jurisdiction over the civil action against the third-party tortfeasor.
>
> In this case, the claimant's civil action is under the jurisdiction of the state courts of California and therefore California state law has to be applied to determine whether the settlement-

> related actions of Mr. Wartnick are binding on the claimant.

(Pet. App. C:45-46.)

Employer did not attack the findings of the trial court in its motion for reconsideration, nor in its petition for review before the Benefits Review Board. Indeed, employer relied solely upon California law in its argument to the Board that attorney Wartnick's actions are binding on Mrs. Stadtmiller. Yet before the Ninth Circuit employer argued federal law should apply, because a federal statute is involved. Having denied the Benefits Review Board the opportunity to pass on this issue, employer cannot be heard on this point. See *Marathon Oil Company v. United States*, 807 F.2d 759, 767 (9th Cir. 1986) ("As a general rule, we will not consider issues not presented before an administrative proceeding at the appropriate time.").

Moreover, the courts below correctly applied California law. In resolving the issue of the scope of an attorney's authority to settle a case, federal courts consistently look to the law of the state in which the attorney practices, see, e.g., *Capital Dredge & Dock v. City of Detroit*, 800 F.2d 525 (6th Cir. 1986) (applying Michigan law in diversity action to issue of apparent authority of attorney to settle case), *Lockette v. Greyhound Lines, Inc.*, 817 F.2d 1182 (5th Cir. 1987), (concluding pursuant to Louisiana law that attorney lack authority to settle a case) and *Harrop v. Western Airlines, Inc.*, 550 F.2d 1143 (9th Cir. 1977). There, the court addressed the exact issue present herein, the nature and scope of an attorney's authority to settle a case. Importantly, the case involved an action brought pursuant to a federal statute, the Civil Rights Act of 1964, 42 U.S.C. section 2000e. The court applied California law

in holding that "an attorney has no authority, either actual or implied, to settle an action without the express permission of his client." (*Id.* at page 1145.) The court remanded the case to the district court for further factual inquiry as to whether the plaintiffs had authorized their attorney to settle the case or dismiss the action at issue. See also, *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772 (9th Cir. 1989) which applied California law to reject a claimed oral agreement in breach of contract action, covered by federal statute 17 U.S.C. section 204(a) which required contracts transferring an exclusive license in a copyrighted work be in writing. The court found the defendant's attorney

> could not memorialize the agreement between the parties even if he intended to do so, absent Pinckney's signature on the letter or some express authorization from her. *See, e.g., Blanton v. Womancare, Inc.*, 38 Cal.3d 396, 407, 692 P.2d 645, 652, 212 Cal.Rptr. 151, 158 (1985).

Valente-Kritzer Video v. Pinckney, supra, 881 F.2d 772, 775.

The Ninth Circuit's rejection of employer's argument here provides the correct analysis:

> "Employer contends that Federal law applies, and that under Federal law, a client is bound by the acts of her attorney. The instances in which the courts are authorized to fashion federal common law are restricted to "those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted). Neither category is relevant here. *See Slavin v. Commissioner*, 932 F.2d 598, 601 (7th Cir. 1991) ('Normally the authority of an agent (a lawyer is just a specialized agent)

> derives from state law; that the substantive dispute concerns federal law does not matter.') Moreover, under federal law, '[w]hile there is a presumption that a settlement entered into by an attorney has been authorized by the attorney's client, rebuttal of the presumption renders any purported settlement ineffective.' *Michaud v. Michaud*, 932 F.2d 77, 80 (1st Cir. 1991).

(Pet. App. A:8-9.)

The *Harrop* and *Pinckney* courts correctly recognized California law demands specific authorization by a client to settle an action. "The law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation." *Blanton v. Womancare, Inc., supra,* 38 Cal.3d 396, 404 citing *Whittier Union High School District v. Superior Court,* 66 Cal.App.3d 504, 508 (1977). The *Blanton* court addressed the binding effect of plaintiff's attorney's agreement to resolve the matter through arbitration. Blanton did not consent to the agreement and repudiated it when she learned of it. The court found that in the absence of "express authority, it is established that an attorney does not have implied plenary authority to enter into contracts on behalf of his client . . . and, that authority is not enlarged simply because the contract is entered into in conjunction with pending litigation." *Id.* at page 407. (*See also Levy v. Superior Court* (1995) 10 Cal.4th 578, 896 P.2d 171 which held the signature of a party's attorney is insufficient to create an enforceable settlement in California.)

In attempted support of its position, employer misstates California law, contending that a principal or client

is bound by the acts of her agent or attorney, citing *Gagnon Company, Inc. v. Nevada Desert Inn*, 45 Cal.2d 448 (1955). The *Gagnon* case involved a stockholder suit against the Nevada Desert Inn, and its director and officer Burke, for fraud. Burke raised the defense of res judicata, claiming a prior valid and final Nevada judgment resolved an action concerning substantially the same charges. Plaintiffs in the *Gagnon* action attacked the Nevada judgment, arguing the attorney who agreed to dismiss the Inn's action with prejudice lacked authority. The court upheld the trial court's finding of authority based on a rebuttable presumption of authority. This presumption arose from the court's reconciliation of early cases holding the general authority of an attorney is sufficient to empower him to effect a renunciation of a client's substantive right with "the established principle that the implied general authority of an attorney does not include any power or authority to dispose of the client's substantive rights. . . . " *Id.* at page 460. The court reiterated the general rule that:

> In civil litigation, the attorney, as the client's agent, and in the absence of fraud, has authority to bind his client in all matters pertaining to the regular conduct of a case. . . . In the absence of such special instructions, the conduct and management of the action is entrusted to the attorney's judgment; he decides what should be contested, what points should be taken, and what should be abandoned. *This authority is, however, subject to the qualification that an attorney ordinarily does not have implied authority to do an act which would effect the surrender or loss of a client's substantial rights, for the client determines "the objectives to be attended."*

Id. at page 460, citing 6 Cal.Jur.2d, Attorneys at Law § 156.

Blanton properly distinguished *Gagnon* by noting the matter involved a collateral attack on a judgment. Of course, this matter does not involve a collateral attack on a final judgment, there being no judgment nor even a valid dismissal, but rather defendant's unsupported assertion that certain acts by attorney Wartnick bind the claimant to an unauthorized settlement. *Blanton* rejects this proposition, allowing only binding effect to *authorized* actions. Here, both the widow and her attorney agreed *he lacked authority* to settle her case, and had been instructed to *not* settle her case. (Resp. App. D:19, 21-22; E:26-27.) That evidence rebuts any presumption of authority. In the absence of such authority, attorney Wartnick's actions cannot have any effect on Mrs. Stadtmiller's case.

Finally, employer argues Mrs. Stadtmiller somehow ratified her attorney's unauthorized actions by her own inaction. Ratification of unauthorized acts occurs when the principal, knowing the facts, accepts the benefits of the agent's acts, see *Fidelity & Casualty Company v. Abraham*, 70 Cal.App.2d 776, 783 (1945); *Alvarado Community Hospital v. Superior Court of San Diego*, 173 Cal.App.3d 476, 481 (1958). Employer did not, and could not, establish that Mrs. Stadtmiller knew of the settlement negotiations between attorneys Wartnick and Jones, the dismissal of Waldron Duffy, nor that monies had been deposited in Wartnick's trust fund. Indeed, her actions argue against ratification. Once informed of the offer she rejected it. And, upon rejection her attorney returned the settlement monies, and obtained a vacation of the dismissal. Indeed, the facts of this case are more analogous

to those in *Whittier Union High School District v. Superior Court*, 66 Cal.App.3d 504 (1977), where the court vacated a dismissal of the action with prejudice due to the attorney's lack of authority. The court's reasoning is equally applicable here:

> Quite simply, the controlling question is whether Pierovich had any authority to dismiss plaintiffs' action without their knowledge and consent. If he wholly lacked power to dismiss the cause and acted beyond the scope of his authority in dismissing his clients' complaint, his action remained voidable for an indeterminate period, and his clients could vacate the unauthorized dismissal within a reasonable time after learning of it, regardless of the time limitations in section 473. . . . Because the facts are undisputed that Pierovich's dismissal was wholly unauthorized and entered without any knowledge and consent of plaintiffs, the dismissal may be vacated by the court at any time.

Id. at pp. 507-508.

Employer, though, compares Mrs. Stadtmiller with plaintiff Blanton, who fired her attorney. Of course, the fact that the plaintiff in *Blanton* fired her attorney helped the court to reject ratification. But, the *Blanton* court did not *require* termination, it simply used that fact in arriving at its decision. Sufficient facts are presented here to also deny ratification. Here, Mrs. Stadtmiller refused to sign settlement releases and rejected the offer. Attorney Wartnick conveyed the rejection to Waldron Duffy, returned the monies, and obtained vacation of the dismissal. No further action was required.

V. CONCLUSION

Mrs. Stadtmiller has not received one penny of civil settlement monies. Yet she is threatened with termination of benefits. Clearly, she is the innocent victim in this case, not employer. If a settlement does take place, employer will receive credit. But here, employer seeks to terminate benefits before the existence of an executed civil settlement. This is not the situation Congress considered when it enacted section 33(g), and it most assuredly did not seek to provide employer with an avenue to terminate necessary longshore benefits when the claimant has not benefited from any purported civil settlement. The decisions below followed relevant federal law, and are affirmed by this Court's decisions in *Cowart* and *Ingalls*. This Court's review is unnecessary and the Petition For Writ of Certiorari should be denied.

DATED: March 24, 1997

Respectfully submitted,

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APPENDIX A

U.S. Department of Labor

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In the Matter of BEATRICE STADTMILLER (widow of Delbert Stadtmiller), Claimant, v. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Insurer.	Case No. 92-LHC-2755 OWCP No. 13-87454

ORDER DENYING MOTION FOR RECONSIDERATION

On November 8, 1993, the employer/insurer (hereinafter "the employer") in the above-captioned matter filed a timely petition seeking reconsideration of an order denying the employer's motion for rescission of certain previously-approved stipulations.[1] The petition for

[1] Under the provisions of 20 C.F.R. §802.206(b)(1) petitions for reconsideration must be filed within 10 days after the decision in issue was filed in the Office of the District Director. In this case the District director has certified that the order in question was filed and served on October 22, 1993. Thus, it may

reconsideration contains two basic contentions: (1) that as used in some subsection 33(g) of the Longshore and Harbor Workers' Compensation Act ("the Act"), the term "representative" includes attorneys who represent claimants in Longshore Act proceedings, and (2) that the claimant knew that her attorney had entered into a settlement of her tort claim against Waldron Duffy and ratified that action by silence. For the following reasons, I find these contentions to be without merit.

A. Definition of "Representative"

The employer's contention that the term."representative" in subsection 33(g) includes attorneys is based on the observation that other sections of the Act and other laws enacted by Congress use the term "representative" to refer to attorneys. This argument is not persuasive. While it is true that the term "representative" is sometimes used in the Longshore Act and other statutes to refer to attorneys, there are at least two strong reasons for

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appear that the employer's petition is not timely. However, the postmark on the envelope in which the order was served shows that in fact the order was not mailed until October 27, 1993. Therefore the 10-day period did not begin to run until October 27 and did not terminate until Saturday, November 6. *See Nealson v. California Stevedoring & Ballast Co.*, 966 F.2d 966 (9th Cir. 1993). When the tenth day after service of an order falls on a Saturday, Sunday or holiday, the end of the 10-day period is extended until the next business day. 20 C.F.R. §802.221(a). Thus, since the tenth day after October 27 fell on a Saturday, the employer met the deadline by filing its petition on Monday, November 8.

finding that Congress had no such intention when it enacted section 33.

First, as explained in the prior order, subsection 33(c) of the Act explicitly states that as used in section 33, the term "representative" shall mean the "legal representative" of a decedent. Since statutory terms should be given their ordinary meaning and since the term "legal representative" is a term that ordinarily does not include attorneys, Congress thereby indicated that it did not intend for the term "representative" to be interpreted as including attorneys.[2]

Secondly, it is clear from the context of the second reference to the term "representative" in subsection 33(g) that the term was not intended to include attorneys. This second reference to the term "representative" provides that if a person or the person's representative enters into a settlement with a third person "for an amount less than *the compensation to which the person (or the person's representative) would be entitled* under this Act," recovery under the Act will be barred unless prior written approval for the settlement had been obtained from the appropriate employer and insurer (emphasis added). If this particular

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[2] It is noted that the employer has cited one decision in which the term "legal representative" as used in regulations adopted under the Federal Tort Claims Act was interpreted from its context as applying to attorneys. *See Graves v. United States*, 692 F.2d 71, 74 (9th Cir. 1982). However, this is not how the term is ordinarily used in insurance policies and statutes comparable to subsection 33(g). *See*, e.g., *Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517, 1520 (11th Cir. 1987); *Mobay Chemical Co. v. Hudson Foam Plastics Corp.*, 277 F.2d 413, 416 (S.D N Y. 1967).

segment of subsection 33(g) were interpreted as referring to attorneys, the provision would make no sense, since, unlike claimants, attorneys for claimants are only entitled to recover attorney's fees under section 28 and are never entitled to recover "compensation," a term that is defined in subsection 2(12) of the Act as meaning "the money allowance payable to an employee or to his dependents. . . . "

B. Knowledge of Settlement

The employer also contends that contrary to the findings in the prior order, the claimant was aware that her attorney had settled her claim against Waldron Duffy and had in effect ratified that settlement by failing to take any affirmative action to rectify the situation. As evidence of the claimant's knowledge, the employer relies on the claimant's March 8, 1993 declaration. In that declaration the claimant in effect represented declaration she had not authorized her attorney to settle her civil claim, had not signed any settlement papers, and had not received any settlement monies It thus reflects some knowledge by the claimant of allegations that her case against Waldron Duffy had been settled.

However, the claimant's declaration by itself is not sufficient to show that she was fully informed of the unauthorized actions of her attorney. In particular, the declaration does not indicate any awareness of the key details of the alleged settlement, such as the fact that her attorney had dismissed her civil suit against Waldron Duffy with prejudice or the fact that he had received $4500 for such dismissal. Although it is possible that the

claimant may have been aware from the pleadings filed by the employer that her attorney had dismissed her suit against Waldron Duffy with prejudice, it has not been shown that she in fact read those pleadings, or, even understood them, if she did read them. Likewise, there has been no convincing showing that the claimant was aware of the amount of the alleged settlement at the time she filed her declaration. Indeed, as noted in the prior order, it is questionable whether anyone ever informed the claimant of the amount of the alleged settlement.

It is also important to recognize that even if the claimant had in fact known of the details of her attorney's conduct, it is doubtful that she would have realized that this conduct amounted to an actual settlement. The legal impact of her attorney's conduct is a complicated matter which a person lacking legal training would be unlikely to fathom. Although the claimant was represented by two different law firms, attorneys at both of these law firms were vigorously contending that no settlement had actually occurred and that the interactions of Mr. Wartnick with Waldron Duffy constituted nothing more than an "offer." The claimant undoubtedly relied on these contentions, and it is thus highly unlikely that she ever understood enough about the legal consequences of Mr. Wartnick's conduct to have knowingly ratified that conduct.

Finally, even if it could be concluded that the claimant had been fully informed of the unauthorized actions of her attorney and understood the legal significance of those actions, such a conclusion by itself would not be sufficient to show that the claimant had ratified the unauthorized acts of her attorney. Rather, ratification

could not have occurred unless that claimant took some action to demonstrate her concurrence in the unauthorized actions. The record in this case contains no evidence of such a concurrence. Indeed, the evidence is to the contrary. For example, the declaration the claimant filed in March of 1993 implied an intention to disavow any unauthorized acts of which she may have been aware. Likewise, the testimony of Mr. Wartnick and the attorney for Waldron Duffy indicates that if the claimant was, in fact, informed of the amount of the proposed settlement, she refused to sign the settlement papers, thereby expressly rejecting the alleged settlement.[3] Although the employer's petition for reconsideration suggests that the claimant could have acted more affirmatively to repudiate the actions of her attorney, the employer has failed to cite a single decision in which a court required any more affirmative form of repudiation than has been shown in this case.

Accordingly, I find that the initial decision on this matter was correct and that it should not be revised in any way.

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[3] As previously noted, it is questionable if the claimant's attorney ever actually did inform the claimant of the amount of the alleged settlement or otherwise present the matter to her for ratification.

ORDER

The employer's motion for reconsideration is denied.

/s/ Paul A. Mapes
Paul A. Mapes
Administrative Law Judge

DATE: Nov. 26, 1993
San Francisco, California

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing compensation order was filed in the office of the District Director, 13th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each on November 30, 1993.

Beatrice Stadtmiller
21593 Forster Lane
Fort Bragg, CA 95437-8111

Victoria Edises, Atty.
KAZAN, MCCLAIN, EDISES & SIMON
171 12th Street, Suite 300
Oakland, CA 94607

Mallott & Peterson
2600 Tice Creek Drive - Manor 3
Walnut Creek, CA 94529

Industrial Indemnity
275 Battery Street, 8th Floor
San Francisco, CA 94111

Roger A. Levy, Esq.
LAUGHLIN, FALBO, LEVY & MORESI
2 Embarcadero Center, Suite 500
San Francisco, CA 94111

A copy was also mailed by regular mail to the following:

office of Administrative Law Judges, U.S. Department of Labor, Suite 600, 211 Main Street, San Francisco, CA 94105

Daniel W. Teehan, Regional Solicitor, U.S. Department of Labor, 71 Stevenson Street, P.O. Box 3495, San Francisco, CA 94119-3495

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2620, 200 Constitution Avenue, N.W., Washington, D.C. 20210

/s/ Edward Orozco
EDWARD OROZCO
District Director
13th Compensation District

U.S. Department of Labor

(415) 744-6577

Office of Administrative Law Judges
211 Main Street - Suite 600
San Francisco, California 94105
FAX (415) 744-6569

In the Matter of BEATRICE STADTMILLER (widow of Delbert Stadtmiller), Claimant, v. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Insurer.	Case No. 92-LHC-2755 OWCP No. 13-87454

ORDER DENYING MOTION
FOR RECONSIDERATION-ERRATA

Notice is hereby given that the citation to *Mobay Chemical Co. v. Hudson Foam Plastics Corp.* in footnote 2 of the Order Denying Motion for Reconsideration signed on November 26, 1993, is incorrect. The correct citation is 277 F. Supp. 413, 416 (S.D. N.Y. 1967).

/s/ Paul A. Mapes
Paul A. Mapes
Administrative Law Judge

DATE: Nov. 29, 1993
San Francisco, California

APPENDIX B

KAZAN, McCLAIN, EDISES & SIMON

A Professional Law Corporation

171 Twelfth Street, Third Floor
Oakland, California 94607
(510) 465-7728 • (510) 893-7211
FAX: (510) 835-4913

[Balance Of Letterhead Omitted In Printing]

April 16, 1992

Harry Wartnick, Esq.
Cartwright, Slobodin, Bokelman, Borowsky,
Wartnick, Moore & Harris, Inc.
101 California Street, Suite 2600
San Francisco, California 94111

Re: *Beatrice Stadtmiller (Delbert, deceased)*

Dear Harry:

I am representing Mrs. Beatrice Stadtmiller in a longshore compensation case. I attended a conference on her case on April 15, 1992, and there I was able to persuade the defendant to commence longshore compensation benefits to her. I am informed and believe that Mrs. Stadtmiller will begin receiving compensation benefits next week.

Our office referred the Stadtmiller civil case to you. At your earliest convenience, please provide me with a copy of the civil complaint and I will see that it is served on all the defendants in Mrs. Stadtmiller's compensation cases. Also, since Mrs. Stadtmiller is receiving longshore

compensation payments, she cannot accept any civil settlements without the consent of the longshore compensation insurance carrier. Therefore, if you receive any civil settlement offers for Mrs. Stadtmiller, please advise and I will attempt to obtain the consent of Industrial Indemnity, the longshore compensation carrier.

Thank you for your anticipated attention. I look forward to hearing from you.

Very truly yours,

KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation

By: _____
VICTORIA EDISES

VE: 72957

KAZAN, McCLAIN, EDISES & SIMON

A Professional Law Corporation

171 Twelfth Street, Third Floor
Oakland, California 94607
(510) 465-7728 • (510) 893-7211
FAX: (510) 835-4913

[Balance Of Letterhead Omitted In Printing]

June 9, 1992

Harry Wartnick, Esq.
Cartwright, Slobodin, Bokelman, Borowsky,
Wartnick, Moore & Harris, Inc.
101 California Street, Suite 2600
San Francisco, California 94111

Re: *Beatrice Stadtmiller (Delbert, deceased)*

Dear Mr. Wartnick:

Industrial Indemnity has commenced payment of nominal longshore compensation benefits to Beatrice Stadtmiller. Therefore, her civil case cannot be settled without Industrial Indemnity's consent. If you receive any offers to settle Mrs. Stadtmiller's civil case, please advise me and I will attempt to obtain Industrial Indemnity's consent.

Very truly yours,

KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation

By: _____
VICTORIA EDISES

VE: 73030

APPENDIX C

HARRY F. WARTNICK, ESQ., State Bar No. 54761
MADELYN J. CHABER, ESQ., State Bar No. 88950
STEVEN M. HAROWITZ, ESQ., State Bar No. 71117
AUDREY A. SMITH, ESQ., State Bar No. 118411
NIROMI L. WIJEWANTHA, ESQ., State Bar No. 154216
CARTWRIGHT, SLOBODIN, BOKELMAN, BOROWSKY,
WARTNICK, MOORE & HARRIS, INC.
101 California Street, 26th Floor
San Francisco, CA 94111
(415) 433-0440

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEATRICE STADTMILLER, Plaintiff, vs. FIBREBOARD CORPORATION, et al., Defendants.	No. 692289-2 STIPULATION

IT IS HEREBY STIPULATED by and between plaintiff BEATRICE STADTMILLER and defendant WALDRON DUFFY, INC., that the Dismissal heretofore filed in this action on September 11, 1992, as to defendant WALDRON DUFFY, INC., be vacated and set aside.

Dated: May 20, 1993

For Plaintiff:

CARTWRIGHT, SLOBODIN, BOKELMAN, BOROWSKY, WARTNICK, MOORE & HARRIS, INC.

BY: /s/ Harry Wartnick

Dated: May 20, 1993

For Defendant WALDRON DUFFY, INC.:

ARCHER, McCOMAS & LAGESON

BY: /s/ Roderick D. Jones

ORDER

Good cause appearing therefore,

IT IS HEREBY ORDERED that the Dismissal of defendant WALDRON DUFFY, INC., filed on September 11, 1992, is vacated.

Dated: May ___, 1993

JUDGE OF THE SUPERIOR COURT

Stipulation/Order Re Setting Aside Dismissal
Stadtmiller v. Fibreboard Corporation, et al., Alameda Superior Court No. 692289-2

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

BEATRICE STADTMILLER, Claimant, vs. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Carrier.	OALJ Case No. 92-LHC-2755 OWCP Case No 13-87454

DEPOSITION OF BEATRICE STADTMILLER
TUESDAY, MAY 25, 1993

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* * *

[p. 10] MS. EDISES: No. You did it right. You did it right.

The court reporter is taking down everything that we say. Sometimes when the person – when we are here and we are talking about the same thing, and we all know we are talking about the same thing, we don't have to explain. But sometimes a stranger will read the transcript and he won't know what we are talking about because he wasn't here. So that is why Randy wants to have it put in a certain way.

THE WITNESS: All right.

MR. POPPY: Q. Approximately when did you substitute out Ms. Edises' firm from the civil action?

A. In '92.

Q. They no longer represent you in that action, Mrs. Edises' firm?

A. Not in the civil action.

Q. And the Cartwright firm, do they still represent you in the civil action?

A. Yes.

Q. That was my impression as well.

Who of the Cartwright firm have you spoken to: I know we are kind of getting into a –

MS. EDISES: We are not going to let you go into anything that is privileged.

MR. POPPY: I understand that.

* * *

[p. 20] since, say, September of last year, anything that's gone on?

MS. EDISES: You mean other than the settlement offer?

MR. POPPY: Well, we don't know when that was. That is why I am asking the question.

MS. EDISES: Okay.

THE WITNESS: I have no idea of what's gone on in that suit.

MR. POPPY: Q. Can you place that phone call in time to any extent? Do you recall if it happened in the spring, in the summer, fall?

A. No.

Q. Have you ever received any money in relation to the civil lawsuit?

A. No.

Q. Have you ever authorized dismissing any defendants for any reason in your civil lawsuit?

A. No.

MS. EDISES: Go ahead.

MR. POPPY: Q. And the Cartwright firm is still representing you in that lawsuit?

A. Are they still?

Q. Yes.

A. Yes.

MR. POPPY: Those are all the question I have [p. 21] of you. Thank you very much.

EXAMINATION BY MS. EDISES

MS. EDISES: Q. Mrs. Stadtmiller, just let me ask a few questions in the event we do not call you back to the trial to testify. Okay?

A. Okay.

Q. When you hired or allowed Madelyne and Harry to take over your lawsuit, was it your expectation that they would be allowed to decide who to sue?

A. Yes.

Q. As a caveat to that, is it your expectation that if somebody doesn't belong in the suit or they don't need to be in there that Madelyne and Harry can get rid of them from the case?

A. Well, sure.

Q. And we have talked a lot about settlement. Do you believe that Madelyne and Harry can settle your case without telling you about it?

A. No way.

Q. You are sure about that?

A. Well, sure. Because I was the one that started it, I guess.

Q. Okay. Do you expect that if there is a settlement you will have to sign something saying that you have [p. 22] settled; is that your expectation?

A. That's right. That's right.

Q. All right. And –

A. I and the children.

Q. Okay. You are not the only person involved in the suit?

A. No.

Q. So in order to make a settlement you and the children have to sign a piece of paper authorizing the settlement? Is that what you were talking about?

A. A legal paper.

Q. Mrs. Stadtmiller, you are aware that Mr. Wartnick has been told not to settle your civil case without a consent of Industrial Indemnity?

A. Yes, he has been told.

MR. POPPY: Objection for the record. The proper foundation has not been laid.

MS. EDISES: Q. And this is what you signed, wasn't it, that you have not authorized Harry and Madelyne to settle your civil lawsuit in the absence of obtaining consent from Industrial Indemnity?

A. That is what you told me.

Q. Are you aware that written instructions have been provided to Madelyne and Harry that they are not to enter into any settlement without the consent of Industrial Indemnity?

[p. 23] A. I believe you affirmed this for me.

Q. And so the record is absolutely clear, those written instructions came from me, did they not?

A. Yes.

Q. And we discussed those written instructions before I sent them, did we not?

A. Yes. That's why I called you.

MS. EDISES: Thank you very much.

MR. POPPY: I have some more questions about this written instructions.

RE-EXAMINATION BY MR. POPPY

MR. POPPY: Q. When were these written instructions sent to the Cartwright office?

A. Well –

MS. EDISES: If you know, say, but don't guess on it. Don't guess on dates.

THE WITNESS: I did not –

MS. EDISES: Do you know the date?

THE WITNESS: No.

MR. POPPY: Let's go off the record a second.

(Discussion off the record.)

MR. POPPY: Back on the record.

Q. When did you discuss any written instructions that would be sent to the Cartwright firm from Ms. Edises?

Defendant's Exhibit A

Victoria Edises, Esq.
KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation
171 Twelfth Street, Third Floor
Oakland, California 94706
Telephone: (510) 465-7728

Attorneys for Claimant
BEATRICE STADTMILLER

BEATRICE STADTMILLER, (Widow of DELBERT STADTMILLER), Claimant, vs. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Carrier.	OALJ Case No. 92-LHC-2755 OWCP Case No. 13-87454 DECLARATION OF BEATRICE STADTMILLER

I, BEATRICE STADTMILLER, declare the following under penalty of perjury:

1. I am the claimant in the above-captioned case.

2. I have also filed or caused to be filed on my behalf a lawsuit against the manufacturers and suppliers of asbestos.

3. I have not received any money as a result of the filing of a civil lawsuit against the asbestos manufacturers and suppliers.

4. I have not authorized my attorneys to settle my civil lawsuit against any asbestos manufacturer in the absence of obtaining consent from INDUSTRIAL INDEMNITY.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8 day of March, 1993, at Fort Bragg, California.

DATED: 3/8/93

/s/ Beatrice Stadtmiller
BEATRICE STADTMILLER

APPENDIX E

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	CALJ NO: 92-LHC-2755
DELBERT STADTMILLER (Deceased) and BEATRICE STADTMILLER (Widow),	OWCP NO: 13-87454
Claimants,	
v.	
MALLOTT & PETERSON and INDUSTRIAL INDEMNITY COMPANY,	
Defendants.	

Tuesday
June 22, 1993

211 Main Street,
Suite 600
San Francisco, California

The above-entitled matter came on for hearing, pursuant to notice, at 9:05 a.m.

BEFORE: HONORABLE PAUL A. MAPES
Administrative Law Judge

[p. 2] APPEARANCES

On behalf of the Claimants:

VICTORIA EDISES, Esq.
Kazan, McClain, Edises & Simon
171 12th Street, Suite 300
Oakland, California 94607

On behalf of the Defendants:

ROGER A. LEVY, Esq.
Laughlin, Falbo, Levy & Moresi
Two Embarcadero Center, 5th Floor
San Francisco, California 94111-3823

On behalf of Harry Wartnick (Witness):

Stephen M. Tigerman, Esq.
CARTWRIGHT, SLOBODIN, BOKELMAN,
BOROWSKY, WARTNICK, MOORE
& HARRIS, INC.
101 California Street, 26th Floor
San Francisco, California 94111

* * *

[p. 34] (Off the record to change tapes.)

JUDGE MAPES: If you be seated right there. If you would please raise your right hand?

Whereupon,

HARRY WARTNICK

was called as a witness herein and, after having been duly sworn, was examined and testified as follows:

JUDGE MAPES: Fine.

MR. TIGERMAN: Your Honor, I'm Mr. Wartnick's lawyer. Would you like me to make an appearance?

JUDGE MAPES: Sure.

MR. TIGERMAN: My name is Stephen Tigerman of the law firm of Cartwright, Slobodin, and I'm appearing as Mr. Wartnick's attorney.

JUDGE MAPES: Okay. Thank you.

MR. LEVY: I'm not clear of Mr. Tigerman's role in the proceedings. I don't have any objection to him being here clearly, but I think maybe we should lay the groundwork in advance as to what participation he'll have in the proceedings.

JUDGE MAPES: Well, you're representing the witness; is that correct?

MR. TIGERMAN: That is correct, Your Honor, particularly with respect to any endeavors to – by either counsel to violate privilege either belonging to our clients

* * *

[p. 48] he's just concerned about whether the fact – whether there was a settlement or not.

MR. TIGERMAN: Well, let's – okay. Well, why don't we just go ahead and take it and see where it goes.

JUDGE MAPES: Okay. Why don't we do it a question at a time then?

MR. LEVY: Okay.

JUDGE MAPES: Proceed, Mr. Levy.

MR. LEVY: Thank you.

BY MR. LEVY:

Q Is it true that you or your office represents Beatrice Stadtmiller in a civil matter against various defendants relating to an asbestos injury allegedly sustained by her husband?

A Yes.

Q Okay. And to the best of your estimate or recollection, when did you become involved in your representation of Ms. Stadtmiller?

A Probably spring of 1992, approximately.

Q And that representation resulted as a result of a referral from the Kazan office?

A That's correct.

Q Now as part of the litigation in this case, you were asked to and in fact prepared a declaration dated March 19th, 1993, which is in the Defendant exhibit packet [p. 49] as Exhibit B, and is not contained in the Claimant's exhibit packet, but do you recall that declaration?

A I recall it, yes.

Q Have you seen it recently?

A No, I haven't.

Q Do you want to take a look?

A Yes, I'd like to.

MS. EDISES: I have it for you.

THE WITNESS: Thank you. All right.

BY MR. LEVY:

Q Okay. If we could focus on No. 2, sir, it indicates that you have never had authority from Mrs. Stadtmiller to settle any part of her civil case?

A Yes, sir.

Q And can you tell me what you meant in your declaration by had authority to – from Ms. Stadtmiller to settle any part of her civil case?

A I think it's fairly straightforward. I can't settle her case without her approval.

Q She never gave you specific authority to settle with any of the defendants, is that what you refer –

A That is correct.

Q And did she – and again, I'm talking about some kind of communication, whether written or verbal; she never gave you a written or verbal communication to settle any of [p. 50] her case against any defendant specifically?

A I'm confused with the negatives in your question.

Q Um –

A She never gave me permission to settle her case against anybody.

Q Okay. And my next question was going to be, I take it that she never gave you general authority to settle with anybody or bodies?

A She – that is correct.

Q Okay. Now in point No. 3, you indicate civil settlement papers have never been sent to Beatrice Stadtmiller from my office, and Mrs. Stadtmiller has never signed any civil settlement papers.

What do you mean by civil settlement papers?

A Releases.

Q Okay. So we can substitute the word "releases" for civil settlement papers?

A Yes.

Q Okay. Now point No. 5 indicates that your office has never forwarded any monies representing settlement of the civil case to Ms. Stadtmiller, and "I have no knowledge of any civil settlement monies received by Beatrice Stadtmiller."

And let's focus on the word "received" as it applies to Beatrice Stadtmiller and your understanding of [p. 51] the word "received" in that part of your declaration.

A To my knowledge, it –

MS. EDISES: Objection. There's no question pending.

THE WITNESS: All right.

BY MR. LEVY:

Q Was is your understanding the use of the word "received" in point 5 of your declaration?

A That Beatrice Stadtmiller has never received any money.

Q Okay. If I can go into this a little further, do you mean to say that she never received in her hands a check that represented proceeds from a civil defendant?

A Yes.

Q Okay. And in point 4 of your declaration, sir, you indicate you have not entered into any civil settlements with any civil defendant, and can you tell me on what basis you make that conclusion?

A We haven't. I don't know what else I could say to clarify that.

Q Now point 6, you indicate that last year, and that would have been 1992, you negotiated a group of 60 cases with civil defendant, Waldron, Duffy.

Now you use the word "60," and I don't want to be picky, but if I asked you at this point if it might have [p. 52] really been 59, would you have a strong objection with me?

A No, there may have been one case that we talked about and that we decided to defer discussions on. But we're talking the same group of cases.

Q All right. And there wasn't a group of 60 and a group of 59?

A No, there was not.

Q Okay. Now going on in paragraph 6, you indicate that – it looks like it's about the fourth sentence, "Similarly, I have not accepted the proposed settlement with Waldron, Duffy on behalf of Beatrice Stadtmiller," and I want to know what you mean by "I have not accepted the proposed settlement?"

A Again, I have not – I don't know what to say to elaborate that.

Q Well, you –

A There was never an acceptance of the offer made by Waldron, Duffy to Mrs. Stadtmiller, and I certainly didn't accept it. I didn't have authority to, I never communicated an acceptance, and never did accept it.

Q Now in Item 7, you indicate that "After negotiating with Waldron, Duffy, defendant Waldron, Duffy or its insurance carrier chose to send me a check for the entire amount of the 60 offers, rather than sending 60 separate checks." And again, we can substitute the [p. 53] number 59?

A Yes.

Q And is it your recollection that there was a single check?

A I don't know. I don't see the checks when they come in the office. Rod Jones called me and asked – or I don't recall if it was during one of our conversations, simply asked if he could send one check rather than cutting the 59 or 60, whatever the number was, and I told him sure.

Q In fact, in this case, I believe there were two checks, one from Ohio Casualty, one from Hanover; does that sound to be plausible to you?

A It's certainly plausible, and that is what Ms. Edises told me yesterday.

Q Okay.

A That is the first time I learned there were two checks.

Q All right. So you didn't actually see the checks?

A No, I do not see the checks.

Q Okay. You do acknowledge, however, in your declaration that a portion of the check, and we can change that to checks, was sent on behalf of Beatrice

Stadtmiller, and at that time, remained in your trust account; this was March 19th, 1993?

A Yes.

[p. 54] Q Okay. Now was the manner in which these 59 or 60 cases were resolved insofar as Waldron, Duffy is concerned, typical or unusual in the way that you process the resolution of these cases short of trial?

MS. EDISES: I'm going to object on the grounds that the question is somewhat unintelligible.

MR. LEVY: Well, according to Mr. Wartnick's reaction, it may have been funny, but I don't know if unusual is the right –

JUDGE MAPES: Well, I understood it. If the witness doesn't understand it, I'm sure he'll say so.

Do you understand that question?

THE WITNESS: I believe so.

JUDGE MAPES: Okay. Please answer it then.

THE WITNESS: Asbestos litigation is extremely unusual, and with the numbers of defendants and the numbers of case that are pending, the negotiation process varies from defendant to defendant, and from law firm to law firm, so – all right, there was nothing extraordinary about this. I'm not sure that it's identical to anything I've done before in terms of the methods, but it was certainly within the range of settlement techniques that are used in asbestos cases to resolve large numbers of cases, or to attempt to.

BY MR. LEVY:

Q Okay. Now I take it it is not unusual to settle [p. 55] piecemeal with defendants throughout the course of litigation?

A Well, to settle – in this – yes, to the extent that I obtain offers from defendants and my clients –

Q Accept them?

A – eventually accept them.

Q Right.

A Or eventually reject them, one or the other.

Q It is not unusual to start out with, say, 30 defendants and settle 15 or 20 or whatever and be left with a few either at trial or just before trial; is that true?

A That's more often what occurs –

Q Okay.

A – rather than the contrary.

Q All right. And is that what was going on in these 59 cases, and more specifically, the Stadtmiller case?

MS. EDISES: Objection. The question's overbroad.

MR. LEVY: Why?

MS. EDISES: Because –

MR. LEVY: I said in the Stadtmiller case.

MS. EDISES: Right. Because every case is somewhat different, and he's lumping 59 cases with Mrs. Stadtmiller's case –

MR. LEVY: I'll withdraw the question.

[p. 56] MS. EDISES: – instead of asking just about –

MR. LEVY: I'll withdraw the question.

MS. EDISES: – Mrs. Stadtmiller's case.

JUDGE MAPES: Okay. He's withdrawn the question.

MR. LEVY: And I'll rephrase it.

BY MR. LEVY:

Q Is that what was going on in Ms. Stadtmiller's case?

A Yes. Mr. Jones wanted to talk about that group of cases on behalf of Waldron, Duffy. Mrs. Stadtmiller's case was one of them –

Q Was included?

A – and that was one of the cases that we talked about.

Q Okay. All right. Now apparently there was some type of understanding or agreement with Mr. Jones for the resolution of these 59 or 60 cases insofar as the two of you were concerned?

A Yes.

Q Is that correct?

A That's correct.

Q And included in those 59 or 60 cases was Ms. Stadtmiller's case?

A Yes.

Q And is it true that these discussions took place [p. 57] in or about August of 1992?

A It was over a much more broad – it was over a much broader period of time. I would estimate it was probably over a minimum two or three month period of time.

Q Beginning in?

A Sometime in the spring or early summer.

Q Okay.

A May, June, sometime in there, I would guess.

Q And did they culminate in August of 1992?

A I believe that's correct.

Q Okay. And what happened next after the culmination of the discussions, and I take it, agreement between you and Mr. Jones as to what these cases should settle for on an individual basis?

A I don't –

MS. EDISES: Objection. The question is extremely vague. There's no foundation –

THE WITNESS: Yeah, I don't under – sorry.

MS. EDISES: – that there was an actual agreement –

MR. LEVY: Well, he said there was.

MS. EDISES: – to settle the cases. No, he did not.

THE WITNESS: I didn't say there was –

MR. TIGERMAN: Yeah, I will object. That assumes [p. 58] a fact not in evidence.

MS. EDISES: That's right.

MR. LEVY: Well, now, wait a minute here. I don't want to deal with two opposing counsel. We've started at the beginning with our groundwork that these objections were going to be related to work product and to privilege. And this Counsel appears to not have much respect for that agreement.

MR. TIGERMAN: Your Honor, that is related to the privilege because we're talking again about the thought processes of counsel. I mean, Mr. Wartnick can talk about what – you know, about what transpired in the general sense, but you know, I'm talking about the agreement was that an offer would be made. I think that's what he said, but to assume that there was a settlement made and then – that opened the door on the privilege like that, I – you know, I would just object that that was opening the door on something that doesn't exist.

JUDGE MAPES: Well, I don't know that it's worth arguing about.

Can you rephrase that, Mr. Levy?

MR. LEVY: I will. And I may have varied a bit from what I thought Mr. Wartnick said.

BY MR. LEVY:

Q And I think he said – correct if I'm wrong, you [p. 59] and Mr. Jones had an understanding of what the resolution value of these cases should be?

A Mr. Jones made offers on the 59 or 60 cases, whatever the exact number is, that I indicated to Mr. Jones I considered to be fair and that I considered to be offers that I could recommend to my clients.

Q So you had understandings?

A Yes, to that extent.

MR. LEVY: Is there an objection here?

MS. EDISES: No.

MR. LEVY: Just a deep – all right.

BY MR. LEVY:

Q My question that resulted in this volley was what happened next? Apparently that's overly broad, but – so I'll withdraw it and ask you then did the receipt of the check in your office constitute the next event with respect to the understanding you and Mr. Jones had about the resolution of these cases?

A I don't know.

Q Or checks. Because you don't know when the checks were received?

A If you're asking me in terms of a timing sequence what occurred –

Q Fair enough.

A Even those things that I know, I can't necessarily

* * *

[p. 62] that Ms. Stadtmiller had against the myriad defendants, were you? It was just as to Waldron, Duffy?

A The dismissal that I signed was as to Waldron, Duffy. That is correct.

Q Okay. Do you know why you signed this dismissal?

A Yes.

Q And why was that?

MR. TIGERMAN: Objection, Your Honor. That calls for his thought processes again. Now we're in work product again.

JUDGE MAPES: Well –

MR. TIGERMAN: What was going on in Mr. Wartnick's mind is work product privilege with respect to a pending case. Why he signed the dismissal.

JUDGE MAPES: Okay. I'll overrule the objection on the grounds that the work product privilege is not applicable in this proceeding.

THE WITNESS: Okay.

JUDGE MAPES: Please respond.

THE WITNESS: Okay. This is – to answer the why takes a little bit of background. Is that acceptable?

JUDGE MAPES: Fine, sure.

THE WITNESS: When – at approximately the time that Mr. Jones agreed on offers to my various clients, he asked either at that time or shortly after if they could [p. 63] send us one check rather than cutting checks on the individual files. I said, "Sure, that's fine." Our office was to prepare the settlement papers and send them out

to clients, and he wanted to send the check to me, or checks, whatever the number turned out to be, and requested, I guess about a month later or so, whatever the timing was, that we sign requests for dismissals anticipatory of clients accepting the offers.

He requested this in addition so that he could stop being a named defendant in these cases and therefore, stop having a requirement to pay Berry & Berry, which is – in both San Francisco and Alameda Counties, a law firm that is designated by the Court to conduct general discovery, and bills – it's my understanding bills on a per case basis to each defendant.

And the understanding was that we would – I would sign requests for dismissal for him, and would at the time that my clients accepted the settlement papers, would sign the settlement papers and would forward them to him, and that in the event that any of my clients rejected the settlement offer, we would set aside the request for dismissal, and that case would proceed forward as to Waldron, Duffy.

So that is the reason that that request for dismissal was signed.

[p. 64] BY MR. LEVY:

Q You referred to a law firm, Berry & Berry. Would it surprise you to learn that Mr. Jones says that he didn't know what Berry & Berry was?

A It would shock me.

Q Pardon?

A It would shock me –

Q It would shock you?

A – if Mr. Jones said he didn't know what Berry & Berry was.

Q I'll try and find that in the deposition testimony.

Now what is your understanding of the legal effect of the request for dismissal with prejudice against Waldron, Duffy?

A That they are no longer in the litigation as I indicated to you when we spoke over the telephone. I probably made a mistake in signing a request for dismissal with prejudice as opposed to correcting it to sign it without prejudice. However, Rod Jones did honor the discussions and the agreement that we had.

Q Well, I'm referring, Counsel and Your Honor, to page 94 of – I've got Claimant's exhibit packet for Mr. Jones's deposition instead of my own. And –

JUDGE MAPES: It's 94 of whose exhibit?

* * *

[p. 67] JUDGE MAPES: Well –

MR. LEVY: Well –

THE WITNESS: Could you –

MR. LEVY: We've all been doing this long enough and –

THE WITNESS: Would you rephrase your question –

MR. LEVY: I will.

THE WITNESS: – so I could understand it, please?

BY MR. LEVY:

Q In the course of any litigation, you generally have multiple opportunities to discuss settlement; is that a fair statement to make?

A Yes.

Q Okay. And during the course of those discussions, offers are made?

A Yes.

Q Is that correct? Okay. Do you always give a request for dismissal with prejudice when such an offer is made and file it with the court?

A No. As I told you, I made a mistake in signing a dismissal with prejudice. I should have signed one without prejudice.

Q Well, do you even ever sign a request for dismissal without prejudice when there's been an offer in a case –

[p. 68] A Routinely.

Q – with no acceptance?

A Yes, routinely.

Q You give a request for dismissal without prejudice even before you've discussed with your client whether or not this is an offer to accept?

A Yes.

Q And –

A So long as there is an agreement from the defendant that they will come back into the litigation if the offer is not accepted at that point.

Roger, the costs of litigation in asbestos litigation overwhelm the indemnity payments. I think the Rand study done a few years ago shows that it's something like $2.37 in defense costs or litigation costs for every dollar that goes to victims. And many of these companies are running out of money.

Q I understand that.

A And from their perspective, this is a major inducement to settlement, is to be able to cut off the litigation expense at a particular time, and only if necessary to reenter.

Q Well, I understand that, but –

A And that is regularly ongoing in the Superior Courts and the courts themselves are encouraging it.

[p. 69] Q You know the amount of money that at least Mr. Jones thought he was paying to settle this case, don't you?

A I know the amount of money that Mr. Jones offered to settle this case, yes.

Q And in fact transmitted to your firm along with money for several other defendants?

A Not other defendants, for other plaintiffs.

Q Or other plaintiffs, I'm sorry?

A Yes, sir.

Q All right. And that amount was what in your mind?

A I can't remember it –

Q Four thousand five hundred dollars –

A Oh, for Stadtmiller, right, $4,500. Yes.

Q Okay. And for that transmission, you returned a request for dismissal with prejudice?

MS. EDISES: Objection. Argument –

THE WITNESS: No, that is not correct.

MS. EDISES: – misstates Mr. Wartnick's prior testimony. It's argumentative.

JUDGE MAPES: Well, you – do you want to persist with that question, or – I'm – I'd like to hear it again you want to persist with it, because I'm not sure I heard in it what –

MR. LEVY: All right.

[p. 70] JUDGE MAPES: – Miss Edises heard.

MR. LEVY: All right.

BY MR. LEVY:

Q You gave a request for dismissal with prejudice. That has meaning. It ends the case; is that correct?

A Barring or absent a stipulation or mistake under 473 of the Code of Civil Procedure, yes, that would end the case as to that defendant.

Q And was there such a mistake in this case?

A Yes.

Q When was that discovered?

A It was discovered when this became an issue here.

Q When did that become an issue here?

A Sometime in the last few months. Whenever Victoria contacted me.

There's no question that I should have signed that request for dismissal without prejudice, because that was the intent.

Q I'm not clear, however, what happened in your office after the money was received and the passage of six to seven months before the stipulation was entered, what happened to the money?

A It stayed in our trust account.

Q I'm not clear why it stayed in your trust account for even five months before you became aware of these [p. 71] proceedings? Can you explain that?

A I knew there was a – I don't understand your question.

Q Well –

A I knew there was a Longshore and Harbor Worker Act pending.

Q And how did you know that?

A Because Victoria sent me at least two letters and talked to me about the case on several occasions.

Q And those in fact are Exhibits 3 and 4 on pages 122 and 123 of the Claimant's exhibit packet?

MS. EDISES: I don't think Mr. Wartnick has seen Claimant's exhibit packet so that –

MR. LEVY: I'm going as fast as I can.

THE WITNESS: I have seen the Claimant's exhibit packet.

MS. EDISES: Oh, you have?

THE WITNESS: Yes.

BY MR. LEVY:

Q Well, they're addressed to Mr. Wartnick, and I'm going to ask Mr. Wartnick at this time if he recognizes them?

A I've seen, I believe, signed copies of these letters, yes.

Q And the first one is dated August the 16th, 1992, [p. 72] which is the day after –

A No, I think there's an earlier one, isn't there?

Q Do – are you aware of an earlier letter? The second one in the exhibit packet is dated June 9th, 1992.

MS. EDISES: It's April 16, 1992.

THE WITNESS: Yeah, I'll –

MR. LEVY: Did I say August?

JUDGE MAPES: Yeah, you said August, you meant April.

MR. LEVY: I'm sorry. Okay. I get my A's confused.

BY MR. LEVY:

Q What is your understanding of what Ms. Edises told you in that letter?

A Which, the April letter?

Q The April 16th?

MS. EDISES: May we show the witness the letter?

MR. LEVY: Yeah, he's – sure.

THE WITNESS: Thank you.

Okay.

BY MR. LEVY:

Q Do you remember the question?

A I think the letter is self-explanatory. She asked for a copy of the complaint, I believe, and I assume I sent her one. I don't recall doing it, but I assume I did, or [p. 73] somebody in my office did, and she told me that we couldn't settle any portion of the civil case as to Mrs. Stadtmiller.

Q Well, let me ask you what your understanding is of these particular sentences.

"Also, since Mrs. Stadtmiller is receiving Longshore Compensation payments, she cannot accept any civil settlements without the consent of the Longshore Compensation insurance carrier. Therefore, if you receive any

civil settlement offers for Mrs. Stadtmiller, please advise and I will attempt to obtain the consent of Industrial Indemnity, the Longshore Compensation carrier."

What is your understanding of that language?

A I think it's straightforward.

Q Okay. Ms. Edises says in her letter that Mrs. Stadtmiller is receiving Longshore Compensation payments and therefore cannot accept any civil settlements without the consent of the Longshore insurance carrier, okay?

Now what is your understanding of accept civil settlements?

A That she can't accept a civil settlement. She can't settle her case.

Q Okay. And what does it take to settle her case?

A A signed release.

Q You think a signed release is necessary?

[p. 74] A Yes.

Q Okay. Do you believe that you could have merely sent the money from the trust account and not obtained a signed release and avoided the admonition that Ms. Edises was giving you?

MS. EDISES: Objection, unintelligible.

MR. LEVY: To you – I –

BY MR. LEVY:

Q Do you understand it?

A What I could have done? I could have – I suppose I could have, and if I do so, I'm probably defrauding whatever insurance companies Rod Jones is representing because he insisted on a – as is his right, to releases being signed before any money was disbursed.

Q Would it – all right. Would it surprise you to hear that Mr. Jones testified that the return of the release is not essential and in fact, in many cases, the releases don't come in for a year or so, and maybe –

MS. EDISES: Object –

BY MR. LEVY:

Q – and maybe in some cases, never come in?

MS. EDISES: Objection.

MR. LEVY: I'm only –

JUDGE MAPES: What's the objection?

MS. EDISES: Mr. Levy has misstated [p. 75] Mr. Jones's testimony.

MR. LEVY: Well, all right, let me –

THE WITNESS: Do you want me to respond?

JUDGE MAPES: In what respect has he misstated it?

MS. EDISES: Mr. Jones testified that the settlements were contingent upon receipt of a release. He also testified that he wasn't worried about not receiving a release if there was a settlement, that sometimes the releases come in piecemeal, but he also testified that he always receives a release.

But he was clear in his testimony that any settlement was contingent upon receipt of a signed release.

MR. LEVY: That's not clear. In fact, he said there may have been instances in his office where no release was ever obtained. And that in fact the release of the dismissal with prejudice ended the case –

MS. EDISES: Right.

MR. LEVY: – as far as he or his client was concerned.

MS. EDISES: Your Honor, again, I object –

MR. LEVY: It's in the deposition. I'm only asking –

JUDGE MAPES: Well –

MS. EDISES: Misstates Mr. Jones's testimony.

JUDGE MAPES: – what does this – now the

* * *

[p. 96] notice, right?

MS. EDISES: Right.

MR. LEVY: Can – exactly. Can we have a stipulation then that consent was never obtained or sought? Is that – will you agree to that?

MS. EDISES: No, I'm not agreeing to anything.

MR. LEVY: Okay. Fine. Let's go on.

MS. EDISES: You know, the time to approach with agreements was before the proceedings. I'm sorry,

Your Honor. I think these are side bar and don't really belong here.

JUDGE MAPES: Well, I don't doubt that Mr. Levy will be able to establish it with the witnesses that his client didn't get notice and didn't get consent, so –

MR. LEVY: All right. That's fine.

JUDGE MAPES: – let's move on.

MR. LEVY: Okay.

BY MR. LEVY:

Q Was money ever returned to Waldron, Duffy on behalf of Ms. Stadtmiller?

A Yes.

Q Okay. And when was that?

A I don't have the exact date. It was within the last 60 days, I would – I believe.

Q Well, the stipulation allowing withdrawal was [p. 97] signed, I believe, by you and Mr. Jones on or about May 20th, 1993.

A The check – our trust account check was returned to them simultaneous –

Q Okay.

A – with the stipulation.

Q And that stipulation appears to have been prepared by your office?

A That's correct, it was.

Q You recognize it?

A Yes, I do.

Q It's on page 124 of Claimant's exhibits. And it is dated May 20th?

A If that's the date that Mr. – that Rod Jones signed this –

Q Okay.

A – that is the date that the check was delivered.

Q Now the copy that is provided in the Claimant's exhibit packet doesn't show that it was ever signed by the Judge of the Superior Court. Is that the case or –

A No, it definitely was signed.

Q It was signed?

A Do you have – we have – I think Steve has a copy with him.

MS. EDISES: We have a – yeah, it was signed.

[p. 98] JUDGE MAPES: Would somebody like to offer that, or would you stipulate that it's been signed?

MS. EDISES: Well, Your Honor, I thought that I did offer it.

JUDGE MAPES: Oh, did you offer it?

MS. EDISES: Let me check.

MR. LEVY: Well, no, it's in the exhibit pack, but it's not signed by a judge, so –

JUDGE MAPES: No, I mean – well, I mean a signed copy?

MS. EDISES: Oh, you're right.

MR. LEVY: May I just see it, and if I can take a look, I'll be happy with it.

It appears that Judge Kawaichi –

MS. EDISES: Kawaichi.

THE WITNESS: Kawaichi.

MR. LEVY: – Kawaichi signed it the day after you guys did on May 21st; is that your understanding of when it happened?

JUDGE MAPES: So will the parties stipulate then that it's been signed by the Superior Court Judge?

MR. LEVY: I will.

JUDGE MAPES: Fine.

BY MR. LEVY:

Q Okay. And you think your trust account was [p. 99] returned at about that time?

A It was delivered to Mr. Jones together with the stipulation.

Q Okay. Now you were aware some months before that this controversy had developed; is that right?

A I was certainly aware in March, yes.

Q Okay. You weren't made aware until March?

A I don't know – I say that because I've got my – I'm looking at my declaration dated March 19th.

Q Oh.

A I don't know whether I was advised in February or March; it was sometime in that time period.

Q Why did you choose to enter into the stipulations in May and return the money in May?

A I didn't choose to. My client rejected the settlement offer.

Q Why didn't you just send the money back in March and say the offer's unaccepted? Hasn't been accepted?

A Because Mrs. Stadtmiller had not yet rejected the offer.

Q When did she reject the offer?

A Sometime shortly before the May 20th date. I don't know exactly when, but it would have been sometime in late April or early May.

Q Was there any communication between August and

* * *

[p. 109] CROSS EXAMINATION

BY MS. EDISES:

Q Mr. Wartnick, is Mrs. Stadtmiller the only member of the Stadtmiller family which your firm represents?

A No.

Q You also represent the decedent's children?

A Yes, we do.

Q And insofar as the Stadtmiller case is concerned, do you have day to day management and control over the case?

A No. The Alameda County cases in my office are under Madelyne Chaber's supervision.

Q Okay. So insofar as what goes on from day to day, you do not really have much input into what goes on in this particular case?

A I have input, but I don't follow it on a day to day basis.

Q All right. Now did you settle Mrs. Stadtmiller's case against Waldron, Duffy?

A No, I did not.

Q Would you explain to the Court –

MR. LEVY: I'm going to object to the question and ask that the answer be stricken. It calls for a conclusion in that form.

JUDGE MAPES: Well –

MR. LEVY: I mean, I refrained because that's the [p. 110] ultimate question in this case; has there been a settlement, at least insofar as Section 33G contemplates it.

JUDGE MAPES: Well, that certainly is the ultimate question, and I'm – I think he's entitled to give his opinion as to –

MR. LEVY: Okay, as long as it –

JUDGE MAPES: – whether he thought it was a settlement or not.

MR. LEVY: All right.

JUDGE MAPES: But I realize that his opinion and his conclusion and –

MR. LEVY: That's fine. That's fine.

JUDGE MAPES: Fine.

BY MS. EDISES:

Q Would you explain to the Court what transpired between you and Roderick Jones, the attorney for Waldron, Duffy regarding settlement in the Stadtmiller civil case?

A Well, yeah, I think I've done that over the last couple of hours.

Over a period of months, we had a negotiation process on a group of about 60 cases that went back and forth. At the very commencement of that process, I told Rod that anything we did would have to be on a recommend basis. With 60 individuals involved, it's impossible to go back and forth, communicate each offer as we go through, get [p. 111] acceptance or rejection, that what we would be negotiating were numbers that I could recommend to clients.

We – in late July, or I think it was early August, arrived at numbers in the group that I felt were reasonable and that I could comfortably recommend to the clients, and at some point in the process, it was agreed that our office would prepare the settlement papers in terms of the releases, that it would be a – whatever form of release was acceptable. There are a couple of standard

forms that are generally used that the court has looked at and has found acceptable in San Francisco.

The – at some point in the process, Rod asked me if we wanted one check or multiple checks, that it was easier for them to cut one check, and we said that was fine. And that we would hold the money in our trust account until individual clients returned releases and those were signed to him.

We talked about cutting off their defense expense and obligation through Berry & Berry. We agreed – or I agreed that we would sign requests for dismissals in order that they could report that – to Berry & Berry and otherwise that they were no longer actively involved in the litigation, with the understanding that if a client rejected the offer, at that point, they would reenter the litigation and would effectively be bound by whatever occurred in [p. 112] the interim.

The – this case and the other cases proceeded in that manner. I have received Victoria's letters telling me we could not settle because of the Longshore situation. I knew that I did not have authority from any of my clients to accept the offers from Waldron, Duffy, but that what we were negotiating were settlement offers that I felt comfortable that I could recommend.

We awaited word from Victoria to let us know when we could settle on behalf of Mrs. Stadtmiller, and certainly, we were never told that the Longshore case, either that the offers had been approved by the Longshore carrier, or that for other reasons, the admonition that she had sent was lifted.

Eventually, Mrs. Stadtmiller said in light of – I assume in light of what was going on that she was rejecting all of the offers, and this offer. We so advised Waldron, Duffy. They lived up to what they had agreed to do, which was that if any client rejected the offer, they would sign a waiver or vacation of the request for dismissal and would reenter the litigation.

Q Has in fact –

A And that's where we are right now.

Q – Waldron, Duffy reentered the litigation?

A Yes.

[p. 113] Q And you mentioned Berry & Berry. Would you explain who Berry & Berry is and what's a Berry & Berry cost; would you explain how that works generally?

A Okay. Asbestos litigation has been declared complex litigation in both San Francisco Superior Court and Alameda Superior Court, and I think they may involved up in Solano as well; I'm not sure.

In both – certainly in San Francisco, and I believe this is in Alameda as well, the Court appointed the law firm of Berry & Berry to be defense coordinating counsel for all sorts of routine functions in litigation.

If there are 30 defendants, and each defendant is noticing the plaintiff's deposition on a different day, there's chaos. Or if there are records that have to be subpoenaed. If each defendant is subpoenaing the same record, again, there's immediate – there's chaos.

And the Court has appointed Berry & Berry to coordinate these discovery functions on behalf of all defendants.

Their compensation method is privileged. I don't have access directly to it, however, I know – I'm plaintiff's coordinating counsel in San Francisco in the complex litigation, and I know that they are billing on a case by case basis, and that the defense costs to Berry & Berry can add up to huge amounts of money for a defendant [p. 114] over time.

And many defendants wish to avoid those costs, and frankly, to use some of that money to settle cases. That if they can use the money that they're paying to Berry & Berry over a year period of time, save that and use it to help fund a settlement. Everybody benefits.

And I hope that answers the question in terms of what their role is.

Q Okay. And is – has it been your belief, Mr. Wartnick, that you have had instructions from me not to enter into any settlements on behalf of Mrs. Stadtmiller?

A Yes.

Q And in fact, have there ever been any releases prepared in the Stadtmiller civil case?

A No, there have not.

MS. EDISES: Thank you. I have no additional questions.

JUDGE MAPES: Mr. Levy?

MR. LEVY: Yeah, I do. Thank you.

REDIRECT EXAMINATION

BY MR. LEVY:

Q Is it your belief today, Mr. Wartnick, that the $4,500 constituted a release of – excuse me – constituted an amount – would have constituted an amount to settle the Waldron, Duffy exposure to costs alone?

* * *

APPENDIX F

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

BEATRICE STADTMILLER, Claimant,	)	No. OALJ 92-LHC-2755
vs.	)	OWCP 13-87454
MALLOT & PETERSON EMPLOYER, AND INDUSTRIAL INDEMNITY Carrier	)	

DEPOSITION OF RODERICK D. JONES

THURSDAY, MAY 27, 1993

[p. 3] BE IT REMEMBERED that pursuant to Subpoena of Taking Deposition, and on Thursday, May 27, 1993, commencing at the hour of 10:13 a.m. thereof, at the offices of Messrs. Archer, McComas & Lageson, 2033 North Main Street, Walnut Creek, California, before me, MICHELE L. CARMODY, a Certified Shorthand Reporter in and for the State of California, personally appeared.

RODERICK D. JONES

called as a witness by the defendants, who, being by me first duly sworn, was thereupon examined and interrogated as is hereinafter set forth.

MESSRS. ARCHER, MCCOMAS & LAGESON, represented by RAND CHRITTON, Esq., 2033 North Main Street, Suite 800, Walnut Creek California 94596, appeared as counsel for the witness.

KAZAN, MCCLAIN, EDISES & SIMON, represented by VICTORIA EDISES, Esq., 171 Twelfth Street, Third Floor, Oakland, California 94607, appeared as counsel for the claimant.

MESSRS. LAUGHLIN, FLABO, LEVY & MORESI,

* * *

[p. 12] Q. Is Nandor Krause presently associated with the firm?

A. Yes.

Q. Is that Miss or Mr?

A. Mr.

Q. Do you each have your own files in the case or does the firm work out of one file for both clients or insurers?

A. We each have our own files.

Q. With respect to the Waldron Duffy matter, when did you become involved in the representation?

A. I have no idea.

Q. Do you have a rough estimate recollection?

A. It would be so rough as to be almost a guess.

Q. Incidentally, where is the physical file at this point?

A. Somewhere in this office. But I can't tell you if it's sitting on my desk.

Q. It's not in storage or some other location; is that right?

A. No.

Q. What's the present status of the litigation with respect to your client, Waldron, Duffy?

A. The status?

MR. CHRITTON: The status from our office? Status with the court? Status with plaintiff's counsel?

[p. 13] MR. LEVY: Well, whatever?

THE WITNESS: The file is open.

MR. LEVY: That's all I wanted to know.

MS. EDISES: In other words, the litigation is pending?

THE WITNESS: I think that's fair to say.

MR. LEVY: Q. With respect to the litigation, where do things stand? Is there a trial date or settlement conference?

A. I can't tell you that.

Q. I'm going to show you a copy of a document that's noted as a request for dismissal. It was filed in the Alameda County Court and I gather that's Superior Court by the designation here, September 11, 1992. And it bears

in the area designation for attorneys, Roderick D. Jones, of Archer, McComas – lower case – typo of some kind – do you recognize that document?

A. I do.

MR. LEVY: We're going to have this copied and marked as Defendant's Exhibit 1.

(Whereupon, the photostatic copy of the request for dismissal was marked as Defendant's Exhibit 1.)

MR. LEVY: Q. Can you identify this document for us?

A. It appears to be a request for dismissal.

Q. Do you recognize the name of the person who

* * *

and [p. 16] you last spoke with Mr. Wartnick.

MR. CHRITTON: And I'd just paraphrase what you're saying about the settlement, it appears that we don't have one at this time.

MR. LEVY: We're going to get to this in this case whether or not there is a settlement. And I understand, as far as for the record, as far as your firm is concerned and your client is concerned, there isn't a settlement?

MR. CHRITTON: Appears not.

MR. LEVY: Q. Against that background, tell us what happened.

A. The Stadtmiller case was one of several, and I can't tell you precisely how many, but it was in a group of cases that we had with Cartwright's office.

I reviewed those cases, including such things as answers to interrogatories, medical reports, et cetera, et cetera, in an effort to evaluate each of the claims. And I came up with a list of cases and my proposed evaluations, they may have been outright dismissal cases, they may have been cases we were willing to put money on, and I sent that list off to the Cartwright office.

Q. About when was that?

A. I can tell by looking at the date on the filing of the dismissal. In the Stadtmiller case it had to have been sometime in late summer of 1992.

So after I prepared the list and sent it off to

* * *

[p. 21] MS. EDISES: No releases?

THE WITNESS: The releases come later.

MR. LEVY: Q. So the signed dismissal isn't required before the check's delivered, but it's required before the check is allowed to be negotiated?

A. Correct. Actually, I think what happens is the dismissals are prepared and sent over ahead of time, and we ask them to get them all signed and call us when they're ready to go. And then the paralegal gets the check.

Q. And It's the duty of the paralegal to make sure that each and every dismissal is there as outlined by you

in the cases before the check can be delivered or handed to a representative of Mr. Wartnick's firm.

A. Yes.

Q. Then you say releases come later; is that right?

A. Yes.

Q. Was a release ever received by your firm, to your knowledge, from Beatrice Stadtmiller in this case?

A. No.

Q. Under those circumstances, what was your procedure in this case?

A. I'm not sure what you're asking me?

Q. Did you care that you didn't get a release?

A. Ultimately, I would be concerned, yes. But, typically, the releases kind of filter in one or two at a time apparently because it takes some time for plaintiff's

* * *

[p. 26] Q. All right. Now, do you believe that's Mr. Wartnick's understanding?

A. I believe that's his understanding.

Q. Now, on that basis, then did you sign the stipulation?

A. Yes, I did.

Q. Is there some recital in the stipulation about this understanding?

A. I don't think so.

Q. What exactly does the stipulation say?

A. Just that I had agreed to vacate.

Q. Do you and Mr. Wartnick have anything in writing confirming this understanding?

A. No.

Q. Has the stipulation been filed with the court?

A. I don't know that, but I suspect that it has been.

Q. And that would have been within the last two weeks?

A. Yes.

Q. I take it this was all finalized after the second conversation with Mr. Wartnick?

A. That's true.

Q. Were any of the funds that were delivered by you – by your firm, back in September, returned to your firm or your clients?

A. Yes.

[p. 27] Q. Do you know if they've actually been returned or there's just been a promise to return?

A. No, we have received a check from the Cartwright office.

Q. Do you know the amount of the check?

A. Again, I think it's forty-five hundred.

Q. Do you believe it was the identical amount that was allocated to Mrs. Stadtmiller?

A. Yes.

Q. There was no interest or anything like that in the check?

A. No.

Q. There was none?

A. No.

Q. Did you see the check itself?

A. Yes.

Q. Was it marked "trust account" or anything?

A. I believe it was from the trust account of the Cartwright firm.

Q. That was within the last two weeks?

A. Yes.

Q. And I take it, then, that the file is in your office and nothing active is going on in it other than what we're doing today?

A. I think that's a fair assessment.

Q. I'm almost finished.

[p. 30] MR. CHRITTON: Obviously, I am trying to understand what your question is and the parameters. I don't want Mr. Jones to be asked to determine a term that has certain implications to you folks. I don't want him to stumble into something.

MR. LEVY: If you don't want him to answer that, it's fine.

THE WITNESS: When you asked me what my understanding of a settlement is or how I define it, I assume that you're asking me to use that term in the context that I'm used to using it in settling my cases that I deal with.

MS. EDISES: Yes, that's correct.

THE WITNESS: A settlement to my mind is a consideration that's given in exchange for a release, dismissal of some sort of legal action.

MS. EDISES: Q. In so far as your custom and practice is concerned, do you consider a settlement to be entered into after money is exchanged for a release and dismissal of a legal action?

MR. LEVY: And I have the same objection.

THE WITNESS: Can I hear the question again?

(Record read.)

MR. LEVY: That's been asked and answered.

THE WITNESS: Yes.

MS. EDISES: Q. Is a settlement in force not [p. 31] entered into within the auspices of the –

MR. CHRITTON: That calls for a legal conclusion.

THE WITNESS: I didn't hear all of your question.

MS. EDISES: Would you wait until I finish before you make your objection. Thank you.

Q. Is a settlement unenforceable under California law without a written settlement agreement?

MR. LEVY: My objection would have been that you haven't established this individual as an expert to testify in this area, but I'll stipulate that he is – I don't think you can just go off and ask him these things.

THE WITNESS: My understanding is it is not enforceable.

MS. EDISES: Q. Now, in terms of your meetings with Mr. Wartnick, and in terms of the Stadtmiller case, would it be correct that you met with Harry Wartnick on approximately a group of about 60 cases, that you submitted offers to him on that group?

A. Are you referring to the group that Stadtmiller was in?

Q. Yes.

A. I really can't tell you how many cases were in that particular group. That's not an unusual number. It could have been, but I just am not sure.

Q. In terms of the Stadtmiller case, do you believe that you and Mr. Wartnick sat down face-to-face and talked

* * *

[p. 33] Q. So you believe that he had that authority or this would be his recommendation to his client?

A. Frankly, I'm not sure what my state of mind was in that regard at the time that we were dealing with this particular group of cases.

Q. Now, was the agreement that you had with Mr. Wartnick and the payment of money contingent upon your receiving signed releases from Mrs. Stadtmiller and the other plaintiffs in the Stadtmiller case?

A. Yes, that was the understanding.

Q. And would your client allow you to settle – and when I say "your client," I mean Waldron, Duffy – allow you to enter into a settlement or settle a case without a written release – written, signed release?

A. I don't know whether they would allow me to do that or not. I don't recall if I ever received any specific instructions from them one way or the other.

Q. But your custom and practice is not to consider a settlement completed without a written release?

A. That's my custom and practice.

Q. And the release is contingent or the release is a condition of settlement? Is that correct, sir, the release is a condition of settlement? In other words, you do not have a settlement without a written, signed release?

MR. CHRITTON: We understand what you're driving at, counselor. There are a number of cases we settle [p. 34] without settlement releases and without formal release. In other words, in a particular case if there's no money made we will get a dismissal without a formal release being filed or being sent or being signed.

MS. EDISES: Q. What happens if you pay money and you get a dismissal, but don't get a release?

A. What happens?

Q. Has that ever happened?

A. It may have. I think eventually we get releases. Somebody may have moved to tin-buck-too and the plaintiff's attorney is having a hard time tracking his client down. But I think eventually we get the signed release.

I can't honestly say that we have any files in the office where we haven't ultimately gotten the release, although, there may be some. My own personal feeling is as long as I have the dismissal I feel somewhat comfortable.

Q. But getting the release is a condition of the settlement, is it not?

A. That's true.

Q. Do you consider that Mrs. Stadtmiller's civil action against Waldron, Duffy has been settled?

A. No.

Q. Prior to this deposition today have you ever spoken with any member of Mr. Levy's office regarding the Stadtmiller case?

A. I believe when I received a witness fee check and

* * *

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No. 96-1163

In the Supreme Court of the United States

OCTOBER TERM, 1996

MALLOTT & PETERSON AND INDUSTRIAL INDEMNITY COMPANY, PETITIONERS

v.

BEATRICE STADTMILLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g), requires the prior written approval of an employer and its insurer when a "person entitled to compensation (or the person's representative)" settles an action against a third party who may be liable for a work-related injury, if the settlement is "for an amount less than the compensation to which the person (or the person's representative) would be entitled" under the LHWCA. The questions presented are:

1. Whether, as used in Section 33(g), the term "representative" includes an attorney who is not entitled to LHWCA compensation but serves as legal counsel for a surviving spouse in a lawsuit against a third party.

2. Whether respondent entered into a third-party settlement through her attorney when the attorney lacked actual or apparent authority to enter into such a settlement on her behalf and she neither ratified, nor obtained any proceeds from, the purported settlement.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the petition (Pet. ii), the Director, Office of Workers' Compensation Programs, was a respondent in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 98 F.3d 1170. The decision of the Benefits Review Board (Pet. App. 12-31) is reported at 28 Ben. Rev. Bd. Serv. (MB) 304, and the decision of the administrative law judge (Pet. App. 32-52) is not yet reported.

JURISDICTION

The court of appeals entered its judgment on October 24, 1996. The petition for a writ of certiorari was filed on January 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires maritime employers to pay compensation for work-related injuries that result in a disability to, or the death of, a covered employee, without regard to fault as a cause of the injury. See 33 U.S.C. 904, 908, 909. A person entitled to compensation under the LHWCA may also sue a third party who may be liable for the injury or death, without forgoing his or her right to compensation under the LHWCA, although the employer is entitled to offset such a third-party recovery in certain circumstances. See 33 U.S.C. 933(a) and (f).

Section 33(g)(1) of the LHWCA requires the prior written approval of an employer and its insurer when a "person entitled to compensation (or the person's representative) enters into a settlement with a third person" who may be liable for a work-related injury or death, if the third-party settlement is "for an amount less than the compensation to which the person (or the person's representative) would be entitled under [the LHWCA]." 33 U.S.C. 933(g)(1). A failure to obtain such prior written approval from the employer and insurer results in the termination of all rights to compensation and medical benefits under the LHWCA. 33 U.S.C. 933(g)(1) and (2).

2. Petitioner Mallott & Peterson is an employer subject to the LHWCA, and petitioner Industrial Indemnity Company is its insurer. Between 1940 and 1946, Delbert Stadtmiller (respondent's now-deceased husband) was exposed to asbestos while working for Mallott & Peterson. In June 1990, he filed a claim for LHWCA disability benefits for asbestos-related

cancer. Pet. App. 13-14. He died from that work-related condition in December 1990. In December 1991, his widow, respondent Beatrice Stadtmiller, filed a LHWCA claim for her husband's disability benefits as well as a LHWCA claim for death benefits on her own behalf. Pet. App. 14.

3. a. In February 1993, the parties submitted to the administrative law judge (ALJ) proposed stipulations settling all the issues regarding respondent Stadtmiller's claims under the LHWCA. Pet. App. 14. Pursuant to the parties' joint request and in light of the stipulations, the ALJ remanded the matter to the district director on February 26, 1993. Pet. App. 33.

On March 5, 1993, petitioners moved to rescind the stipulations and for entry of summary judgment denying respondent Stadtmiller's claim in its entirety, on the ground that respondent, through her attorney, had settled a civil lawsuit against a third party for the wrongful death of her husband, without obtaining petitioners' prior written approval of the settlement. Pet. App. 14, 33. Petitioners contended that, under Section 33(g), the purported settlement precluded respondent Stadtmiller from any entitlement to benefits under the LHWCA. Respondent Stadtmiller opposed petitioners' motion, contending that no settlement had occurred, and submitted supporting affidavits from respondent and her attorney in the civil suit. Pet. App. 35. Respondent Stadtmiller also contended that she had not authorized her attorney to settle her civil lawsuit against the third party, had not signed any settlement papers regarding that suit, and had not received any settlement money connected to that suit. *Id.* at 14-15, 34. She explained that the third-party defendant apparently

had provided her attorney in that lawsuit with funds that were offered in return for the settlement of a group of lawsuits, including respondent's, but that respondent had not been informed of the offer and had not accepted or rejected that proposed settlement. *Id.* at 34, 36-37.

b. The ALJ vacated the remand order, Pet. App. 33, and considered the merits of petitioners' motion. The ALJ denied petitioners' request for summary judgment because of the existence of a genuine issue of material fact. *Id.* at 35.

After a hearing, the ALJ denied petitioners' motion for rescission of the stipulations. Pet. App. 32-52. The ALJ found that it was clear that respondent Stadtmiller did not enter into a direct settlement with the third-party defendant in her civil suit. *Id.* at 44. The ALJ also found that no "representative," within the meaning of Section 33(g), had entered into a third-party settlement on respondent Stadtmiller's behalf. Pet. App. 44. The ALJ reasoned that, as used in Section 33(g), "representative" means "legal representative" as defined in Section 33(c) of the LHWCA, 33 U.S.C. 933(c). Pet. App. 44 n.2.[1] The

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[1] Section 33(c) governs cases in which a payment of LHWCA compensation is made into a special statutory fund under Section 44 of the LHWCA (33 U.S.C. 944), rather than to a person entitled to compensation. A payment of an award is made by an employer to the Section 44 fund when the Secretary determines that there is no person entitled under the LHWCA to compensation for the death of an employee that would otherwise be compensable under the LHWCA, *i.e.* where the compensable injury caused death and the decedent has no eligible survivors. In such a case, the employer must pay $5,000 to the Section 44 fund. 33 U.S.C. 944(c)(1). As a result of such a payment, the employer obtains the right, by virtue of

ALJ then concluded that the term "legal representative" means "a person who oversees the legal affairs of another," such as an executor of an estate or a court-appointed guardian, but does not include an attorney at law except when acting as an executor, guardian, or in a similar capacity. *Ibid.* (quoting in part *Black's Law Dictionary* 807 (5th ed. 1979)).

The ALJ also rejected petitioners' argument that respondent Stadtmiller was vicariously bound by the actions of her attorney. Pet. App. 44-45. The ALJ recognized that, to achieve the purpose of Section 33(g) to protect employers and their insurers from third-party settlements that would adversely affect their interests, a claimant should not be permitted to avoid the requirements of Section 33(g) by authorizing an attorney to enter into a third-party settlement for the claimant. To determine whether a claimant is bound by her attorney's third-party settlement in a particular case, the ALJ invoked the standard that would be applied by the court having jurisdiction over the civil action against the third-party defendant. Pet. App. 45. Applying the California law that would govern respondent Stadtmiller's third-party lawsuit, the ALJ concluded that respondent Stadt-

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Section 33(c), to seek damages from a third party. Section 33(c) provides:

> The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

33 U.S.C. 933(c).

miller is not bound by any settlement-related actions of her attorney because her attorney was not acting within the scope of his express or implied actual authority, her attorney was not acting with apparent authority, and respondent Stadtmiller had not subsequently ratified any purported settlement. *Id.* at 45-50.[2]

c. The ALJ denied petitioners' motion for reconsideration. 96-1163 Resp. Stadtmiller Br. in Opp. App. 1-9. The ALJ reaffirmed that, because the ordinary meaning of "legal representative" does not include an attorney, Congress did not intend to include attorneys within that statutory term. The ALJ also explained that the second reference to the term "representative" in Section 33(g) makes clear that the term was not intended to including attorneys. That reference is to settlements for less than "the compensation to which the person (or the person's representative) would be entitled" under the LHWCA. Although attorneys are entitled to recover attorney's fees under the LHWCA, they are not entitled, as attorneys, to "compensation" under the LHWCA. "Compensation" is defined in Section 2(12) of the LHWCA (33 U.S.C. 902(12)) to mean "the money allowance payable to an employee or to his dependents." 96-1163 Resp. Stadtmiller Br. in Opp. App. 4. Therefore, the ALJ concluded, to construe the term "representative" to include attorneys in Section

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[2] Because of its conclusion that respondent Stadtmiller was not bound by any settlement actions of her attorney and was not barred by Section 33(g) from receiving compensation under the LHWCA, the ALJ did not find it necessary to decide whether the attorney's actions, in fact, constituted the execution of a settlement agreement. Pet. App. 50-51.

33(g) "would make no sense." *Id.* at 3-4. The ALJ also rejected petitioners' contention that respondent Stadtmiller was aware that her attorney settled her lawsuit. *Id.* at 4-6.

4. The Benefits Review Board (Board) affirmed. Pet. App. 12-31. It concluded that the ALJ's construction of Section 33(g) is consistent with the plain language of the Act. The Board agreed with the ALJ that the term "representative" in Section 33(g) means "legal representative" of a decedent as set forth in Section 33(c), a phrase that does not ordinarily include an attorney. Pet. App. 19, 21-22. The Board also agreed that this interpretation of "representative" allows for a reasonable reading of the provision in Section 33(g)(1) that refers to entering into a settlement with a third party for less than the amount to which the "person (or the person's representative)" would be entitled under the LHWCA. Pet. App. 22. The Board reasoned that it would make no sense to interpret that provision as referring to attorneys, as petitioners urged, because "[w]hile a legal representative of the decedent may receive compensation" under the LHWCA, "his attorney cannot." *Ibid.*

Like the ALJ, the Board also concluded that respondent Stadtmiller was not bound by her attorney's actions under agency principles. Pet. App. 24-27. Specifically, the Board rejected petitioners' argument that respondent Stadtmiller had ratified the settlement. Applying the state law that would govern the third-party lawsuit, the Board ruled that the ALJ's finding that respondent Stadtmiller had not

ratified any settlement was rational, supported by the record, and in accordance with law. *Id.* at 26-27.[3]

5. The court of appeals denied petitioners' request to set aside the Board's order. Pet. App. 1-11. The court noted, as a threshold matter, that "considerable weight" is due the statutory construction of the LHWCA urged by the Director, Office of Workers' Compensation Programs (OWCP). *Id.* at 6. Thus, the court explained, if the Director's interpretation is reasonable, the court should defer to it. *Ibid.* (citing *Martin* v. *OSHRC*, 499 U.S. 144, 158 (1991)). The court concluded that, for the reasons stated by the Board, the Director's interpretation of "representative" in Section 933(g) should be upheld. Pet. App. 6-7.

The court emphasized that Section 33(c) of the LHWCA specifically defines "representative," for purposes of Section 33 (including Section 33(g)), to mean the "legal representative of the deceased." Pet. App. 7 (citing also *Aetna Life Ins. Co.* v. *Moses*, 287 U.S. 530, 539 (1932)). The court further explained that only the Director's interpretation of "representative" can be reconciled with the text of Section 33(g)(1), which refers to entering into settlements "for an amount less than the compensation to which the person (or the person's representative) would be entitled" under the LHWCA. Pet. App. 7 (quoting 33 U.S.C. 933(g)(1)). Although the legal representative of a deceased claimant can be entitled to compensation

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[3] The Board concluded that the ALJ properly determined that it was unnecessary to reach the question whether the execution of a settlement had, in fact, occurred, in light of its other rulings, although the Board noted that it appeared that there was no settlement on the facts presented. Pet. App. 28-31.

under the LHWCA, a decedent's attorney cannot be. Pet. App. 7. The court rejected petitioners' argument that the Director's interpretation frustrates the purpose of Section 33(g) to protect employers from inordinately low settlements. The court noted that an attorney cannot settle a case without some action by the client, *i.e.*, the claimant or his or her legal representative. Pet. App. 7.

The court of appeals also rejected petitioners' alternative argument that, assuming respondent Stadtmiller's attorney is not a "representative" for purposes of Section 33(g), respondent is nonetheless subject to the Section 33(g) bar because she ratified the settlement negotiated by her attorney. Pet. App. 8-10. The court ruled that petitioners did not meet their burden of proving that respondent Stadtmiller ratified the attorney's efforts. It agreed with the Board that the ALJ's finding that respondent Stadtmiller had not ratified any settlement agreement regarding the civil lawsuit was supported by substantial evidence, including the testimony of the attorney and of the third-party defendant. *Id.* at 9-10.

The court of appeals specifically rejected petitioners' argument that the question of ratification should be governed by federal law and that, under federal law, a client is bound by an attorney's unauthorized settlement. Pet. App. 8-9 n.2.[4] The court noted that "[t]he instances in which the courts are authorized to fashion federal common law are restricted to 'those in which a federal rule of decision is "necessary to protect uniquely federal interests,"

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[4] Petitioners had not argued before the Board that federal law should apply, but the court of appeals nevertheless addressed the issue.

and those in which Congress has given the courts the power to develop substantive law.'" *Ibid.* (quoting *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted)). In the court's view, this case did not fall into either category. It further ruled that, in any event, federal law establishes only a presumption that a settlement entered into by an attorney was authorized by the client, and rebuttal of the presumption renders any alleged settlement ineffective. Pet. App. 9 n.2.[5]

ARGUMENT

1. Petitioners contend (Pet. 13-18) that the attorney representing respondent Stadtmiller in her civil lawsuit against a third party was her "representative" as that term is used in Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g)(1).

The plain language of Section 33 of the LHWCA refutes petitioners' interpretation. As the court of appeals correctly noted, Congress specified, in Section 33(c), that "legal representative of the deceased" is "hereinafter referred to as 'representative.'" 33 U.S.C. 933(c). The natural reading of that provision is that subsequent references in Section 33 to "representative"—including in Section 33(g)(1)—mean "legal representative of the deceased" and not some broader category, as petitioners urge. "Legal representative" commonly refers not to an attorney acting as legal counsel for an individual, but rather to a person who oversees the legal affairs of an

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[5] In light of its rejection of petitioners' ratification argument, the court of appeals did not reach the question whether respondent Stadtmiller's attorney, in fact, reached a settlement with the third-party defendant. Pet. App. 10 n.3.

individual, such as the executor or administrator of an estate or the court-appointed guardian of another. See *Black's Law Dictionary* 807 (5th ed. 1979).

In addition, limiting "representative" to "legal representative of the deceased" for purposes of Section 33(g)(1) is the only sensible construction of that term when read in the context of Section 33(g)(1) as a whole, which uses the term "representative" three times. As the court of appeals explained, one of those other uses is in referring to settlements for less than the compensation to which a "person (or the person's representative) would be entitled" under the LHWCA. 33 U.S.C. 933(g)(1). The term "representative" in that context cannot include an attorney serving as legal counsel for a claimant, because attorneys are not entitled to "compensation" under the LHWCA. Section 2 of the LHWCA, 33 U.S.C. 902, which furnishes the statutory definitions that govern throughout the LHWCA, provides that "'[c]ompensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." 33 U.S.C. 902(12). Attorneys are not entitled to any monies that are payable to an employee or his dependents under the LHWCA. Rather, the LHWCA specifies the instances in which attorneys, as legal counsel for others, are entitled to monies, and it makes clear that any such payments are in the form of reasonable attorney's fees. See 33 U.S.C. 928, 933(e)(1)(A); cf. *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 117 S. Ct. 796, 801-803 (1997) (in order to be "entitled to compensation" within the meaning of Section 33(g)(1), a person must be entitled to LHWCA compensation at the time of the settlement).

Congress used the term "representative" in a similar context in Section 33(e), a neighboring statutory provision to which the Section 33(c) definition of "legal representative" also applies. Section 33(e) governs the distribution of any recovery that an employer obtains by virtue of pursuing a third-party suit through an action assigned to it from a person entitled to compensation or from a legal representative of the deceased. Section 33(e) requires that the employer retain for itself an amount to cover its litigation expenses ("including a reasonable attorney's fee") and to cover the costs of all LHWCA benefits and compensation (both actually paid and payable in the future). 33 U.S.C. 933(e) If any monies remain in excess of that amount, the employer must pay that "excess to the person entitled to compensation or to the representative." 33 U.S.C. 933(e)(2). Also, if the amount set aside to cover future LHWCA payments is not exhausted at the conclusion of payments, the employer must pay the "excess thereof to the person entitled to compensation or to the representative." 33 U.S.C. 933(e)(1)(D). In light of the express provision in Section 33(e)(1)(A) for payment of attorney's fees, there can be no doubt that the term "representative" in Section 33(e) does not include an attorney acting as legal counsel. Section 33(e) thus confirms that attorneys are paid through reasonable attorney's fees authorized by the LHWCA, not through statutory "compensation," and that attorneys have no right to the residual of a third-party recovery. The Court followed that natural reading when it construed an earlier (although substantively similar) version of Section 33(e) in *Aetna Life Ins. Co.* v. *Moses*, 287 U.S. 530, 539 (1933) (describing Section 33(e), in a case where the person entitled to compensation was de-

ceased, as providing for payment of the excess of a third-party recovery to "to the representative of the deceased").[6]

There is no merit to petitioners' argument (Pet. 15) that interpreting "representative" in Section 33(g) to be limited to a representative of a decedent, as set forth in Section 33(c), will mean that minors and incompetents, who cannot settle except through a guardian or other representative, can never settle with a third party and obtain employer approval. See 33 U.S.C. 911 (deputy commissioner may require court appointment of a guardian or other representative to receive compensation payable to a person who is mentally incompetent or a minor). As used in Section 33(g), "person entitled to compensation" includes minors and incompetents who are entitled to compensation, and such persons may act through guardians or other representatives. Indeed, there is no dispute that even a person entitled to compensation, such as respondent Stadtmiller, who is not a minor or incompetent, may authorize another, including an attorney, to act on his or her behalf for purposes of Section 33(g), and that such a person would be bound by the actions of that attorney. That would be so, however, not because the attorney is a "representative" under Section 33(g)(1), but rather because the attorney's actions were authorized by the person entitled to compensation. See Pet. App. 45

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[6] Because Congress expressly defined "representative" for purposes of Section 33, and because that meaning is reinforced by the context in which that term is used in Section 33(e) and Section 33(g), it is irrelevant that, as petitioners note (Pet. 14-17), the term has different meanings in other sections of the LHWCA or in other statutes.

(ALJ opinion) (claimant cannot avoid Section 33 requirements by authorizing an attorney to enter into settlement on his or her behalf). Thus, Section 33(g)(1) provides for settlements by all persons entitled to compensation, including through authorized actions of their attorneys or guardians, as well as for settlements by legal representatives of decedents entitled to compensation.[7]

2. Petitioners contend (Pet. 19-21) that, even if respondent Stadtmiller's attorney was not her representative within the meaning of Section 33(g), the bar against recovery in Section 33(g) should nonetheless apply because the attorney settled respondent's case when he was acting as her agent and she should be bound by those acts under principles of agency law. Petitioners rely on federal law to support that proposition and contend that the court of appeals erred by applying state law. They also argue (Pet. 20) that, even if state law governed, the court of appeals erred in its interpretation of that law.

a. The court of appeals correctly rejected petitioners' contention that federal law should govern the question whether respondent Stadtmiller was bound by unauthorized settlement actions by her attorney in the civil lawsuit pending in state court. Pet. App.

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[7] Petitioners concede that the interpretation adopted by the court of appeals is a possible interpretation of the Act. See Pet. 13. Accordingly, the court of appeals correctly affirmed the Board and deferred to the interpretation urged by the Director of the Office of Workers' Compensation Programs. The Director is the policy-making authority whose views on questions of statutory and regulatory interpretation under the LHWCA should be given deference. Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987); *Martin* v. *OSHRC*, 499 U.S. at 153.

8-9 n.2 (citing *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)); see also *Atherton* v. *FDIC*, 117 S. Ct. 666, 670 (1997) ("[n]ormally, when courts decide to fashion rules of federal common law," the existence of "a significant conflict between some federal policy or interest and the use of state law" is a precondition) (citing *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994)). In determining whether a person is bound by an attorney's settlement of a third-party civil tort action, the court of appeals (and the Director) reasonably looked to the law that would be applied by the court having jurisdiction over the third-party action, because the rights that are the subject of the settlement arose under that law. Petitioners have not identified any reason to fashion a different standard as a matter of federal common law.

In any event, petitioners err in suggesting (Pet. 19) that, under federal law, a client is bound by the actions of her attorney, regardless of whether the actions were authorized. The general retainer of an attorney does not give that attorney the power to compromise the client's claim. *United States* v. *Beebe*, 180 U.S. 343, 352 (1901). Although a judgment based on a compromise made by an attorney is presumed valid, that judgment will be set aside if it is proven that the attorney did not have special authority to make such a compromise. *Ibid.*

Petitioners ignore *Beebe* and erroneously argue that the decision below conflicts with decisions of this Court holding that a client is bound by an attorney's lack of due diligence in pursuing an appeal, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990), or in prosecuting an action, *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962). The basis for *Irwin* and *Link*, however, is the principle, now codified in

Fed. R. Civ. P. 5(b), that notice to an attorney is notice to the client. See *Irwin*, 498 U.S. at 92-93; *Link*, 370 U.S. at 634. Neither case purported to rule that a client is bound by an attorney's unauthorized settlement.

b. Petitioners' contention that the court of appeals misinterpreted state law also does not merit review. This Court rarely reviews a construction of state law by a lower court. See, *e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988). There is no reason to depart from that practice here. The court of appeals' interpretation is consistent with the well-settled law in California "that an attorney must be specifically authorized to settle and compromise a claim." *Blanton* v. *Womancare, Inc.*, 696 P.2d 645, 650 (Cal. 1985). Petitioners erroneously argue (Pet. 20) that *Blanton* is an exception to a more general rule, announced in *Gagnon Co.* v. *Nevada Desert Inn, Inc.*, 289 P.2d 466 (Cal. 1955), that a client is bound by an attorney's actions. In fact, *Gagnon* is the exception. See *Blanton*, 696 P.2d at 651 n.8 (noting that *Gagnon* had grappled with the "presumption" that an attorney has authority to settle in a case involving a collateral attack on another State's judgment and was "inapposite" in a case involving no collateral attack).

Petitioners maintain (Pet. 20-21) that respondent Stadtmiller ratified her attorney's unauthorized settlement actions by failing to take steps that the client in *Blanton* took. Petitioners, however, do not dispute that the court of appeals properly understood ratification to be a factual question requiring a showing "that the principal, knowing the facts, accepts the benefits of the agent's actions." Pet. App. 10. Here, the ALJ found that the principal, respondent Stadtmiller, never accepted the benefits of

the purported settlement. That finding was properly upheld by the Board and the court of appeals as supported by substantial evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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